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APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1971

Supreme Court, U. S.
FILED
MAR 14 1972
MICHAEL RODAK, JR., CLERK

No. 71-227

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellants*,

v.

ALLEGHENY-LUDLUM STEEL CORPORATION, ET AL., *Appellees*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JURISDICTIONAL STATEMENT FILED AUGUST 13, 1971
PROBABLE JURISDICTION NOTED NOVEMBER 9, 1971

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In the Supreme Court of the United States

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No. 71-227

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellants,*

v.

ALLEGHENY-LUDLUM STEEL CORPORATION, ET AL., *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

APPENDIX

In the Supreme Court of the United States

No. 71-227

UNITED STATES, ET AL., *Appellants,*

v.

ALLEGHENY-LUDLUM STEEL CORPORATION, *et al.*

APPEAL from the United States District Court for the Western District of Pennsylvania.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

November 9, 1971

1970

June 23 Filed complaint.
23 Filed motion for interlocutory injunction.
23 Filed motion to convene a three-judge court.
23 Issued summons.
24 Filed affidavits in support of plaintiffs' request for issuance of temporary restraining order.
24 Entered Order for hearing on plaintiffs' application for a temporary restraining order.
26 Filed motion to intervene, affidavits, proposed complaint and proposed order, of Association of American Railroads.
26 Filed waiver of notice and consent to intervention.
29 Filed motion, notice of motion and proposed order of the Interstate Commerce Commission.
29 Filed praecipe for appearance, motion for leave to intervene, proposed complaint, affidavit, proposed order, motion for interlocutory injunction and notice of motions of The National Industrial Traffic League.
30 Filed motion for interlocutory injunction, affidavit and proposed temporary restraining order of Association of American Railroads.
30 Filed Order designating three-judge panel, Circuit Judge Aldisert and District Judges Marsh and Miller.
30 Hearing on temporary restraining order and motions to intervene. Filed hearing memo.
30 Entered Order granting ICC leave to intervene.
30 Entered Orders granting Association of American Railroads and The National Industrial Traffic League leave to intervene.
30 Filed complaints of Association of American Railroads and The National Industrial Traffic League.
30 Filed motion of the USA and ICC to stay further proceedings.

July 2 Served summons on U.S. Attorney General.
17 Filed reply of Association of American Railroads in opposition to motion to stay.

17 Entered Order and memorandum restraining defendants from enforcing part of the Commission's orders of 8/21/69, 2/18/70 and 3/18/70.
22 Filed transcript of hearing at Pittsburgh on 6/30/70.
23 Filed response of USA and ICC to oppositions to motion to stay.

Aug. 14 Filed 12 volumes of testimony, 11 volumes of verified statements and replies, Commission orders, briefs submitted to Hearing Examiner, and 2 volumes of exhibits, of hearing held before the ICC 3/28/67-8/14/67.
14 Filed memorandum brief of National Coal Association.
14 Filed notice, motion and proposed complaint of the Association of Shippers Advisory Boards.
14 Entered Order granting motion of Association of Shippers Advisory Boards.
14 Filed complaint of Association of Shippers Advisory Boards.
14 Entered Order denying motion of USA and ICC to stay further proceedings and directing briefs be filed on or before 9/15/70 and reply briefs on or before 10/1/70.
26 Filed notice and motion for revised briefing schedule by USA and ICC.
27 Filed opposition to motion for revised briefing schedule.
28 Filed joint answer of USA and ICC.
31 Filed praecipe for appearance of Robert R. Wertz for U.S. Steel.
31 Filed Order granting motion for revised briefing schedule.

Sept. 15 Filed certificate of service of plaintiffs' brief.
21 Filed praecipe for appearance of Samuel P. Delisi as plaintiffs' co-counsel.

Nov. 3 Entered Order extending time for defendants to file briefs until 11/9/70 and plaintiffs to file reply briefs until 11/30/70.

1971

Jan. 19 Held hearing before statutory court, and motions for interlocutory injunction. (motion to admit James F. Tao and Fritz R. Kahn for ICC and

motion to admit Robert A. Girard and John Donelan for plaintiffs granted orally).

Feb. 8 Filed transcript of argument held in Pittsburgh 1/19/71.

Mar. 17 Entered Opinion of Judges.

18 Entered Order directing that interlocutory injunction be made permanent and permanent injunction entered against the ICC. Copies of Opinion and Order mailed to parties of record and West Publishing Co.

23 Entered Order amending footnote 1 on page 1 and second paragraph, line 7 on page 9.

May 17 Filed separate notices of appeal to the Supreme Court by USA and ICC.

19 Mailed copies of notices to Supreme Court.

June 25 Mailed certified record to Supreme Court.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ALLEGHENY LUDLUM STEEL CORPORATION, ET AL.	Civil Action No. 70-731
v.	
UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION	

ORDER

AND NOW, this 23rd day of March, 1971, the opinion heretofore filed in the above is hereby amended as follows:

In footnote 1, page 1, delete "American Association of Railroads" and substitute therefor "Association of American Railroads";

On page 9, second paragraph, line 7, delete "American Association of Railroads" and substitute therefor "Association of American Railroads."

/s/ Russ Aldisert
Circuit Judge

cc: Honorable Rabe F. Marsh, Jr.
Honorable John L. Miller
James I. Collier, Jr., Esq.
Association of American Railroads
Washington, D.C. 20036

Oral Argument in Court Below, FRITZ R. KAHN
(Interstate Commerce Commission)

* * * * *

[13] JUDGE ALDISERT: Is there testimony on the record indicating the capacity of railroads to increase their fleets and to provide better maintenance for their cars?

MR. KAHN: No, your Honor, as far as I know there is not. Neither is their evidence they could not. The record is silent on that point, as I understand it.

* * * * *

INTERSTATE COMMERCE COMMISSION

Service Date
January 23, 1968

EX PARTE NO. 241

INVESTIGATION OF ADEQUACY OF RAILROAD FREIGHT CAR OWNERSHIP, CAR UTILIZATION, DISTRIBUTION, RULES AND PRACTICES

Decided

Competent evidence affording a basis for a conclusion as to the adequacy of freight car ownership not submitted of record. Adoption of proposed car ownership formula, regulations, and car service rules found not shown to be justified. Proceeding discontinued.

* * * * *

REPORT AND ORDER

Recommended by WILLIAM J. SWEENEY, *Hearing Examiner*

In the prior report, 323 I.C.C. 48, division 3 concluded that a substantial inadequacy of ownership in more than one category of freight cars existed throughout the United States among all respondents[1] except those operating in the Pocahontas district. Subsequently, on July 29, 1964, the division entered an order which broadened this proceeding for the stated purpose of obtaining detailed and precise information on all phases of freight car ownership, utilization, distribution, rules and practices which in any manner contribute to or affect the chronic freight car shortage

[1] The respondents are the class I railroads, and a selected group of class II railroads and switching and terminal companies. Individual reference herein to any respondent will be by its short title.

problem, with the view to consideration of (1) the prescription of rules designed to alleviate the problem, and (2) the issuance of an order or direction under the provisions of section 1(13) of the Interstate Commerce Act. In the same order the Commission's Bureau of Inquiry and Compliance, whose title has since been changed to Bureau of Enforcement, was authorized to participate in the proceeding.

A special procedure was adopted for the submission and receipt of evidence. As a preliminary, each respondent was ordered to file a verified return of a voluminous questionnaire which was distributed as an attachment to the order requiring its return. Such questionnaire is reproduced in appendix A hereto. Based on some of the data submitted in response to the questionnaire a verified statement concerning freight car ownership by respondents was prepared by the Commission's Bureau of Accounts, and introduced in evidence by the Bureau of Enforcement; also introduced by the latter party were verified statements prepared by staff members of the Commission's Bureau of Railroad Safety and Service, now called Bureau of Operations. On the same date seventeen verified statements, one of which is a joint statement on behalf of two carriers, were filed by respondents. The reason why the other 207 respondents did not take advantage of the opportunity to file voluntary statements is not revealed of record or otherwise apparent. A few initial presentations were made also by the shipping public; these consist of statements from one shipper and five shippers' associations. Additionally, statements were filed on behalf of The American Short Line Railroad Association, the Secretary of Agriculture of the United States, and the Public Utility Commissioner of Oregon.

The special procedural rules did not permit cross-examination on the aforesaid verified statements prior to the filing of reply statements. The statements filed by the Bureau of Enforcement sparked the interest of respondents to the extent that 47 rebuttal verified statements were filed by them. The opening statements also gave rise to the intervention of 13 shippers, 7 shippers' associations, and 5 port authorities, who filed 27 verified statements in rebuttal; such statements were filed also by 8 of the original intervenors, and 14 statements were filed by the Association of American Railroads, hereinafter called the AAR, on the

behalf of respondents. These numerous statements, composed without the interpretative benefits of cross-examination, contain many duplicative arguments and factual accounts. In general, the rebuttal statements present a solid opposition to the formulas and rules proposed in the opening verified statements.

A hearing was held for the purpose of cross-examination on the initial and rebuttal verified statements. Subsequently, briefs were filed by the Bureau of Enforcement, the AAR, 14 respondents, and 20 interveners. Only the bureau recommends adoption or prescription of the ownership formulas, regulations, and car service rules proposed by the witnesses it represents.

Present status of the proceeding.—As stated in the prior report this investigation was instituted by order of December 20, 1963, for the purpose of obtaining specific and current information on the adequacy of freight car ownership. Another objective was declared to be the development of facts leading to the prescription of rules for alleviating the recurring problem of shortages of freight car equipment. The original order specified that no oral hearing would be scheduled, and it required respondents to supply statistics in response to an appended questionnaire.

The establishment of reasonable rules with respect to car service by common carriers by railroad may be ordered by the Commission in accordance with the provisions of section 1(14)(a) of the act. That section provides that after hearing the Commission may establish such rules. The decision reported at 323 I.C.C. 48 was made without oral hearing; it was based on a review of files in the Commission covering car ownership, and on the information which respondents were required to file in response to the aforesaid questionnaire. The respondents were afforded no opportunity to proffer direct or rebuttal evidence, nor to engage in cross-examination. In the circumstances the findings and conclusions in the prior report merely explain why division 3 believed further proceedings to be necessary and ordered them to be conducted; such untested findings and conclusions may not properly be used as a basis, in whole or in part, for any ultimate judgments herein. The foregoing determination removes any need to evaluate certain trenchant observations made on brief by the AAR concerning conclusions in the prior report. Specifically, reference is

made to the finding as to boxcar ownership in the Eastern District, namely: "Based on reported serviceable ownership, respondents needed in excess of 10,000 additional serviceable boxcars to load traffic originated during the 1963 period." The AAR notes that such a conclusion, and numerous similar findings as to other categories of cars and respondents in other areas, is effectively stating that respondents needed many more freight cars to load the amount of freight they actually loaded and transported.

Burden of proof.—The second order herein gave notice of proposed rule making, and referred to authority specified in sections 1(13), 1(14)(a), and 13(2) of the Interstate Commerce Act, and section 4 of the Administrative Procedure Act. The latter section reads in pertinent part as follows:

> (b) Procedures.—* * * Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply in place of this subsection.

Under section 1(14)(a) of the Interstate Commerce Act the Commission may, after hearing, establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad. The aforesaid requirement for a hearing subjects this proceeding to the above quoted subsection of section 4 of the Administrative Procedure Act, and in turn to the provision of sections 7 and 8 of that act. Section 7(c) of the latter act provides in part that, except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. There being no statute which otherwise provides, it appears that in compliance with the requirements of the Administrative Procedure Act the burden of proof in this proceeding rests on the proponents of rules or orders. As will be detailed later the principal proponents herein are the Bureau of Accounts, and the Bureau of Operations, represented by the Bureau of Enforcement.

Contested rulings and other procedural matters.—The General Motors Corporation, an intervener, moved at the hearing that evidence submitted by the Bureau of Enforcement on behalf of the Bureau of Operations relative to demurrage tariffs be stricken because the subjects of demurrage is not included in the orders which institute this pro-

ceeding and give notice of it to the public. The motion was denied and it is renewed on brief.

In the second order herein it was stated that the proceeding was "broadened for the purpose of obtaining detailed and precise information on all phases of freight car ownership, utilization, distribution, rules and practices which in any manner contribute to or affect the chronic freight car shortage problem". This language encompasses the subject of demurrage and constitutes proper notice. The decision in *Iverson* v. *U.S.*, 63 F. Supp. 101, affirmed 327 U.S. 767, rehearing denied 327 U.S. 819, confirms the foregoing interpretation. In such decision it was found that demurrage charges are historically, textually, in purpose and content, an integral part of the established rules and regulations relating to the use and movement of cars. The renewed motion to strike is denied.

The respondents, Boston and Maine, and the Trustees of the New Haven, on brief allege that the record embraces several procedural irregularities. These alleged defects, in whole or in part, are also cited by the Long Island, and the North Western. Such matters are summarized and determined in the following numbered paragraphs.

1. Certain exhibits prepared by witnesses for the Bureau of Operations were erroneously admitted in evidence. The basis for the objections to receipt of the cited exhibits relates to their evidentiary value or hearsay nature. Such objections are given proper consideration later herein when the evidence is evaluated; they do not constitute an absolute bar to admission in evidence during an administrative hearing.

2. The testimony of all witnesses sponsored by the Bureau of Enforcement should have been stricken from the record because that bureau refused to comply with the so-called Jencks rule which was formulated in *Jencks* v. *United States*, 353 U.S. 657. This objection is not sound. The bureau did not deny the requesting parties access to any basic report, working paper, or other specific document relative to the testimony of witnesses it had sponsored. The requests of the parties to the bureau went beyond their rights under the Jencks rule and, in fact, were in violation of that rule. Such requests proposed a "broad or blind fishing expedition among documents possessed by the Government on the chance that something impeaching might

turn up"; this type of proposal is specifically excluded from the Jencks rule by the aforesaid quotation which in the cited decision is contrasted to a proper demand for specific documents relative to the testimony of a witness.

3. The testimony of a witness for the Bureau of Operations should have been stricken from the record because respondents were erroneously denied the opportunity to inspect documents he used to refresh his recollection. The witness in question did not refresh his recollection concerning his own testimony. He did, at the insistence of respondents and over the objection of counsel for the Bureau of Enforcement, refresh his recollection concerning a verified statement and exhibits prepared by a subordinate employee, and approved by him, so that he could be cross-examined concerning such approval. The need for such a review is evident when it is noted that the employee's statement was submitted on July 1, 1966, and his superior was being cross-examined concerning it on April 5, 1967.

4. That the Interstate Commerce Commission violated the Administrative Procedure Act because it did not advise counsel as requested on the rotational appointment of hearing examiners or on the chain of command and duties of other personnel. The foregoing allegations are correct in part. Counsel was advised as to the rotational appointment of hearing examiners, to wit, that they are assigned cases in rotation as nearly as practicable, a practice which is in accord with the requirements of the Administrative Procedure Act. The allegation to the contrary is unfounded. Counsel was not provided with information concerning the chain of command or duties of personnel other than hearing examiners, nor does the Administrative Procedure Act require the disclosure of such information.

5. That the Administrative Procedure Act was violated because the Interstate Commerce Commission does not maintain a "rotation list" of hearing examiners. That act does not require the maintenance of a rotation list. In fact the latter nomenclature is the verbal concoction of counsel. The Commission does, as stated above, assign cases to hearing examiners in rotation and there is no rational reason to believe that a deviation from such practice occurred in the assignment of this proceeding.

6. That the Administrative Procedure Act was violated because the hearing examiner allegedly was subject to

supervision during and after the initial phases of this proceeding; and that he engaged in investigatory and advisory functions in that period. During the hearing the examiner declined a request by counsel for the New Haven, the Boston and Maine, and the Long Island that he withdraw from the proceeding on the grounds that the Administrative Procedure Act had been violated by the foregoing alleged occurrences. These allegations are contrary to fact, and, if sincerely propounded, stem from obtuse discernment which has produced delusional premises.

The National Industrial Traffic League appeals from the grant of a motion to strike portions of the initial verified statement filed on its behalf. The statements referred to consist of hearsay or broad, baseless conclusions. The witness is without doubt very well qualified in traffic matters, but no person is competent to promulgate conclusions which without further ado answer the basic questions propounded in this proceeding. Major conclusions or recommendations must be prefaced with factual premises leading thereto. The latter requirement was absent with respect to some of the statements which were stricken; the others were based on hearsay.

Initial verified statements filed by respondents.—The respondents were not required to file opening statements but if they chose to do so voluntarily they were required by the second order herein to discuss the subjects listed in appendix B hereto. Among the respondents who submitted opening statements there were 15 who filed detailed replies to the subjects specified in appendix B. To narrate the activities of each such replicant in detail would be of no particular benefit to the purposes of this proceeding because similar data concerning the more than 200 other respondents is not of record. The replies are so few in relation to the roster of respondents that there is no basis for viewing them as typical of most carriers. To the extent that the replies are representative it appears that respondents have been concerned with the need to utilize and distribute freight cars with greater efficiency. The response to this necessity has been active, ingenious, and in many areas of improvement it has required substantial capital expenditures. Research has been conducted as to both operational and marketing conditions; it has resulted in the establishment of incentive rates, the development of

improved and larger freight cars, the construction of automated yards to speed the classification and movement of cars, and the installation of modern communication systems. In the fields of research pertaining to automatic car identification, automatic sampling of grains, and cybernetics the carriers are proceeding with optimism which has a realistic basis.

Some carriers, of course, have made more technical advances and improvements than others. A few respondents are on the threshold of achieving real-time computer processing. When such a system is realized a carrier will have instantaneous access to data showing the location and status of all empty and loaded cars on its lines. To reach real-time capacity it will be necessary for a carrier to advance through so called first and second generations of computers to a third generation; each generation feeds on data made available by the prior system. The potential improvements in the purchase, utilization, repair, and retirement of freight cars under a real-time computer system, even in the initial years when such systems are in force on individual lines only, are incalculable at present because no limit is realistically in view. Information concerning the possible integration of individual computer systems was submitted in rebuttal statements and will be discussed later herein.

The establishment of incentive rates has become increasingly in vogue during the past decade. The purpose of such rates originally was to attract or hold traffic to be moved in the currently owned freight cars. This restricted the use of such rates to the load limits in such cars and led to the development of larger cars tailored to better serve the efficient loading and unloading of various commodities. Basic rates were broadened also to cover multiple carloads and unit trains. The spur of competition as reflected in the form of incentive rates has led to more efficient loading and unloading of commodities, and the movement of available traffic in fewer cars, thus providing more efficient operations at less cost. Illustrative examples were cited by the Southern Pacific as to movements of seven commodities in 1964 under incentive rates. The total movement was performed in 110,159 cars, which was 17,582 cars less than would have been required at the average carload hauled under the prior rates. The latter averages ranged

from 18.26 tons to 48.98 tons, and under the incentive rates the average carload weights were increased in comparative range to 20.23 tons and 69.38 tons.

Parties filing opening statements were invited by the Commission to discuss and justify in detail any rules they proposed, and to discuss the proper formula or formulas to be used in determining the adequacy of freight car ownerships by type by individual carrier. Most of the respondents who filed statements confined their discussion to the subjects listed in appendix B. None of them proposed the adoption of car service rules different from or in addition to those then published by the AAR, nor did any respondent file a car ownership formula to be used in measuring the adequacy of ownership of the various types of freight cars on individual lines.

The questionnaire and responses thereto.—As stated earlier, the second order in this proceeding required the respondents to supply statistics in answer to the questionnaire set forth in appendix A. The following definitions of terms were included in the order: car supply—serviceable revenue freight cars; assigned service—cars designated for a given traffic movement (normally cars move loaded in one direction and are returned to the point of origin); heavy repairs—repairs to revenue freight cars requiring over 20 man-hours; serviceable car—a car in serviceable condition and in service or available for service, including serviceable cars stored; turn-around time—the time required to complete the cycle of loading, movement, unloading and placement for reloading of a freight car.

It was provided also in the order that requests by respondents for interpretation or clarification of the questionnaire were to be cleared through the AAR or The American Short Line Railroad Associations, and that replies to such queries would be circulated by the associations to all members in order to insure uniformity of reporting by all respondents. The carriers asked 79 questions and the replies thereto, under signature of the Secretary, Interstate Commerce Commission, were circulated by the AAR in 36 directives. Subsequently the respondents, some of whom consolidated their reports in reply to the questionnaire, filed 204 reports; 83 reports were filed by class I carriers, 71 reports were filed by class II carriers, and 50 reports were filed by switching and terminal companies. Inspection of

the returns by staff members of the Bureau of Accounts and Bureau of Operations revealed numerous instances wherein the statistics appeared to be unreasonable. This led to the posting of about 500 letters and the making of approximately 200 telephone calls in order to obtain accurate data from the carriers.

Utilization of data collected from respondents.—Reference to the questionnaire (appendix A herein) clearly indicates that the creation of an ownership formula which would encompass numerous factors was contemplated. The individual assigned to the task of preparing such a formula was not among those who composed or processed the questionnaire. When assigned to the task of producing an ownership formula he was given free rein in determining its composition. The formulas he designed utilize approximately ten percent of the statistics the respondents were required to furnish. The expenditure of money and manpower by respondents in collecting the unused statistics is no doubt substantial. For example, the North Western estimated that it spent approximately $100,000 in answering the questionnaire; such costs for the Union Pacific were in excess of $150,000.

Initial verified statements filed by interveners.—The American Short Line Railroad Association asserted that shortages of equipment have resulted from improper utilization and misuse of cars, rather than from inadequate ownership. This assertion concerning one of the basic questions propounded for solution herein constitutes a statement of position or belief, but it has no evidentiary value as proof of the matter asserted. The association believes also that each originating carrier has an obligation to provide sufficient cars, either through ownership alone or in conjunction with use of foreign cars made available under car service rules, to accommodate loadings proffered at stations on its line.

A statement filed on behalf of the Secretary of Agriculture of the United States refers to a study by the Commission's Bureau of Economics which indicates that except for the period of World War II and in 1947, the average time per day that a freight car is moving between terminals is less than 2.5 hours. It is recommended that the Commission analyze the situation and promulgate rules which will result in greater utilization of equipment.

In a statement filed by the National Coal Association it was asserted that the need for additional hopper cars is obvious. However, when the supporting witness appeared for cross-examination in July 1967, he stated that the coal industry had no problem then or in the foreseeable future with respect to a supply of open-top hopper cars. The only uneasiness of the industry is that the Commission might reach a decision herein which would result in the restriction of future freight car purchases to equipment other than open-top hopper cars. With respect to ownership responsibilities it is the stand of the association that a rail carrier is responsible for supplying cars for all traffic originating on its lines and the lines of any short-line connections for which it assumes equipment responsibility.

The National Association of Shippers Advisory Boards, with a membership of about 20,000 shippers located throughout the United States, refers to the changes made in recent years by the railroad industry which prior thereto had resisted innovations. In view of this revised attitude the association warns that the changes being made by respondents render almost futile any purely statistical approach that compares present car supply with that of former years. This observation is obviously true. Statistical reliance on the past, unleavened by reasonable projections for the future interspersed with common sense, can produce nothing but retrogression in car supply or railroad operations. The association is hopeful that this proceeding will reveal facts pertaining to freight car utilization by each respondent, and disclose methods whereby such utilization may be improved. It is recommended that the carriers be admonished to effectuate such necessary but unspecified improvements, and that the record be held open to accord them a reasonable opportunity to correct apparent deficiencies in supply or service before issuance of a final order. No reason for the latter recommendation is submitted.

The National Industrial Traffic League, the largest diversified shipper organization in the United States, established a Special Committee on Ex Parte 241. That committee was authorized to file a statement on behalf of the league. The statement it filed referred to freight car shortages as cited in the prior report herein, and to the decrease in ownership of 257,406 freight cars during the

period from 1950 to May 1966. To change this situation for the better the following recommendations are made by the committee.

1. That the Commission find the present railroad freight car ownership is inadequate to meet the needs of the country's commerce and national defense.
2. That the Commission order class one carriers to furnish car building plans for the period 1967-1971 and 1972-1976. And further, that a report be made by class one carriers to the Commission no later than December 1, 1967 and each year thereafter outlining cars acquired the previous year and whether such car deliveries are meeting the goals of the carriers reported to the Commission.
3. That under the powers granted by section 14(a) of the act the Commission should:
   (a) Establish guidelines governing ownership requirements of all class one carriers by railroad.
   (b) Establish rules governing the retirement of cars. Such rules should provide that a showing be made that such retirement of cars is not contrary to the public interest, i.e., that a railroad be not permitted to retire cars when investigation shows that the cars planning to be retired are in fact required by other railroads.
   (c) Establish rules providing maximum utilization of the car fleet whenever in the Commission's judgment the carriers' own rules and practices are shown to be ineffective in meeting the public interest, i.e., direct surplus cars in one area to another where a car shortage exists, even though such action may require the owning line to relinquish cars while on its own tracks.
   (d) Where necessary, continue to exercise its powers by issuance of car service orders to effect maximum utilization of freight cars.
4. That the Commission recommend to the proper government department that the government owned supply of cars be used to the greatest extent possible to move government shipments to the extent

that any government movements place an unreasonable drain on the railroad-owned freight car fleet.

The Commission is left to its own resources to provide a legally competent foundation for the recommended findings and prescriptions.

In a statement filed on behalf of the Public Utility Commissioner of Oregon it is explained that Oregon is an "originating" State, meaning thereby no doubt that more carloads are originated than delivered. It is asserted that "at times" shortages of equipment sink to 25 percent of requirements, and that since articles produced in Oregon must be marketed in other areas of the nation a freight car shortage has a severe influence on the local economy. It is alleged that the problem of shortages continues to exist in Oregon. In the section of the statement devoted to argument other matters are asserted without any underlying proof as to their authenticity, and therefore, merit no consideration. Based on the latter incompetent argumentative assertions it is proposed that the Commission prescribe rules which are identical to the AAR car service rules then existing, and that noncompliance with such rules be subject to the penalties provided in section 1(17)(a) of the act. This topic concerning prescription of rules will be discussed later in connection with a similar recommendation by the Bureau of Operations.

The Western Wood Products Association represents lumber producers and processors located throughout the twelve western States. Most of the lumber mills are located in small towns, remote from the principal markets, and the shippers rely strongly on rail transportation. When cars are not available, sales are lost to competitors in the southern States who are able to use both rail and truck service. Shortages of cars in the past has continued into the present and the association advocates prescription of the following rule.

> A rail carrier receiving a foreign line car for delivery purposes shall either return the same car or one with equal or better specifications to the origin territory in accordance with the present AAR car service rules or the per diem charges set forth in this tariff shall be doubled retroactive to the date the car was unloaded.

At the time this rule was recommended for adoption the Commission had no authority to prescribe such a rule. In the interim the 89th Congress enacted Public Law 89-430 which amended section 1(14)(a) of the act so as to permit prescription of so-called incentive per diem rates. The evidence supplied by affiant, or otherwise available of record, is not sufficient to satisfy the standards in such amended section. Furthermore, the question of exercising that authority was recently considered by the Commission in *Incentive Per Diem Charges*, 332 I.C.C. 11, based on an extensive record devoted solely to that question. The following affiant also advocated adoption of the aforesaid rule without providing evidence essential to findings in support of its prescription.

The American Plywood Association represents manufacturers whose production of softwood plywood is about 90 percent of the total output in the United States. Factories are located in western and southern States; most of the factories are in California, Oregon, and Washington at locations remote from metropolitan centers. The industry relies on rail carriers for about 90 percent of its transportation requirements. It has suffered from freight car shortages which are believed to occur because: the carriers east of the Mississippi River do not own enough wide door and double door boxcars; when cars are shipped to the latter area, which accounts for the largest consumption of plywood, they are not returned to the originating carriers who have built and remodeled numerous cars to fit the needs of plywood shippers. No competent evidence was introduced in support of these beliefs. Such beliefs fail also to accord any weight to the facts that the types of boxcars the industry desires to use are of relatively recent design and represent but 15 percent of the total boxcar ownership; and that plywood production is the fastest growing industry in the United States. The latter fact, which reflects an annual growth rate of 14 percent, has resulted in a rapid geographical spread in the areas of both production and consumption of plywood in recent years.

The Vulcan Materials Company is the sole shipper to submit an initial verified statement. This corporation is engaged in the production of construction aggregates, concrete products, and chemicals, in the processing of tin plate scrap, and in the fabrication of iron and steel articles. These

activities are conducted at 143 locations in 16 States. In its verified statement a series of car service rules are proposed with the recommendation that they be prescribed by the Commission. No comment on such rules is necessary because they were abandoned by affiant in its rebuttal statement which contains also a different set of car service rules. The latter rules are not recommended for prescription but rather the shipper merely states a belief that "they constitute a basic framework which can be utilized by the Commission and the other parties in arriving at a logical, understandable, coherent and flexible method of accomplishing the effective control so desperately needed in connection with the railroad car fleet." In other words the rules specified in the rebuttal statement are not proposed for adoption as written but merely for study. They were admittedly drafted in contemplation of car service to traffic of the affiant. The special procedure ordered herein did not authorize the submission of proposed rules in reply statements, nor did it contemplate the suggestion of rules for study in lieu of specific rules recommended for prescription by the Commission. Any consideration of these self-serving rules suggested for study would be without regard to the rights of other parties to receive notice of proposals and to have an opportunity to rebut such proposals. In the circumstances an account of the aforesaid rules is not warranted as a matter of proper procedure or substance.

Adequacy of freight car ownership.—In a verified statement filed on July 1, 1966, a witness for the Bureau of Accounts described two formulas, either of which allegedly can be used to determine the adequacy of the freight car fleet on a national scale and the deficit or surplus ownership or cars, by type, on individual lines. A small portion of the data filed by respondents in response to the questionnaire, appendix A hereto, was applied to the formulas and both national and individual deficits or excesses in freight car ownership, by type of car, were computed.

The formulas, and their application, were assailed by the AAR, and individual respondents and interveners. In one of the rebuttal statements it was revealed that on August 26, 1966, the Board of Directors of the AAR had given approval for the staff to draft a formula to serve as a guide in measuring each railroad's responsibility for ownership of general purpose freight cars; the board pub-

lished the following instructions as a framework within which the formula was to be encompassed. "Each railroad should own sufficient serviceable general purpose cars by type to protect local loadings on its line (loadings that both originate and terminate on its line) including local switching service. In addition, each railroad should own the number of serviceable general purpose cars by type that equals its proportionate use of such cars in interline traffic (including the requirements on dependent short line connections) after giving credit for the number of foreign cars that are used in strict compliance with Car Service Rules. NOTE: Each railroad's proportionate share of such cars required to handle interline traffic would be in the proportion that the car days of use in interline service of that railroad is of the total car days of use in such service of all railroads, against which share credit is to be taken for the number of foreign cars that are used by it in strict compliance with the Car Service Rules, and which resultant share is then to be adjusted to include its proportionate share of the total number of cars thus credited to all railroads. In determining the car days all 'no-day' cars of a railroad shall be converted into car days by dividing the total hours on line of all such cars by 24." The formula devised by the AAR staff was described in the statement. Such formula is not final but is subject to modifications as to certain of its factors to the extent that later experience warrants; it has not yet been approved by the membership of the AAR, and the statement concerning it is not direct rebuttal evidence to any initial verified statement. However, such statement was received in evidence as a matter of information concerning current cooperative developments by the respondents in the field of car supply and ownership. In the circumstances, neither endorsement nor criticism of that formula in its earliest stage of development is proper; recognition of the formula is merely in the nature of official notice of its existence, and conclusions concerning it are not justifiable on this record.

Upon reading the foregoing statement, and studying the prospective formula developed by the staff of the AAR, the witness for the Bureau of Accounts recognized that certain fundamental principles in such formula supplied factors which would add refinements to the formulas he had proposed, and would produce better and more equitable

results. Acting on that recognition he prepared formulas incorporating the aforesaid fundamental principles and described them in a statement which was circulated to the parties on February 15, 1967. Although this circulation was not in keeping with the special procedure promulgated in the second order, the statement was received in evidence at the hearing rather than binding the witness to the formulas he had repudiated. The parties were advised that in the circumstances they would be given the opportunity to introduce rebuttal evidence.

Counsel for the Bureau of Enforcement stated that neither the original formulas, nor the applications of data thereto, were any longer relevant herein because of the substantial revisions which the witness made in the formulas. The parties conducted their cross-examination of the witness concerning the revised formulas with that understanding in mind. No application of data was made to the revised formulas. Consequently, there is no competent evidence of record upon which to base a determination concerning the adequacy of railroad freight car ownership either on a national basis or individually by carriers.

In connection with the adequacy of freight car ownership it should be noted in passing that the record contains no quantitative information as to the available substitution of cars, nor facts such as those normally developed through market research. Such data, as stated by the Commission in the following quotation from *Incentive Per-Diem Charges, supra*, are essential to conclusions regarding the adequacy of the freight car fleet.

> Valid conclusions as to the types of cars, the construction of which for future use is to be encouraged by application of either an interim or long-range incentive charge, and which must be found to be in inadequate supply pursuant to the statutory requirement, necessarily require consideration of the extent to which the transportation service they perform is or can also be provided by cars of other types. Such consideration requires a thorough analysis of the services currently desired by the shipping public and those reasonably to be anticipated in the future. An overall, nationwide review of traffic and service demands and trends must precede any valid determination of the existing or prospective national require-

ments for freight cars of particular types. It is quite obvious that application of an incentive charge which served to encourage the acquisition of cars not adaptable to efficient provision of needed service over their normal lifetime would not be in the national interest. Shipper need, demand and acceptance with respect to future equipment is a significant factor.

Revised freight car ownership formulas proposed by Bureau of Accounts. No claim is made that either one of the revised formulas, had it been applied to data which respondents were required to furnish, would have produced more than rough indication as to the adequacy or inadequacy of the ownership of any type of car by any particular respondent. In fact the supporting witness stated that either formula would only be a useful tool to be used by railroad managements in considering purchases of freight cars. It would be necessary to view the results produced by the formulas in the light of facts developed by market and operational research. The formulas were not proffered with the intent that they be adopted or prescribed as an absolute substitute for the independent judgment of each rail carrier concerning its freight car ownership requirements or acquisitions.

The formula recommended by the Bureau of Accounts for adoption by the Commission is called the interline car days formula; it is reproduced in appendix C[2] hereto. The bureau believes that such formula provides the most equitable method of determining each carrier's freight car ownership requirements because it places the economic burden of such ownership on each railroad in proportion to the use which the individual carrier makes of the national freight car fleet. Specifically, it is contended that each railroad should own sufficient cars to load shipments offered for local movements, and each railroad participating in interline traffic should contribute a fair share of the freight cars required to handle that interline traffic. Such fair share is to be determined by the extent to which each carrier participates in the joint business venture of two or more carriers hauling freight with a profit motive in mind. In turn, the extent of each carrier's participation in the joint

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[2] Reference in the formulas shown in appendices C and D to specific sections and items are to those so listed in appendix A hereto.

venture is most appropriately measured, according to the bureau, by the number of interline car days consumed by each carrier.

Switching and terminal carriers are unable to agree with the alleged equitable nature of such a formula. For the most part they serve at ports or industrial centers where congestion is inherent and beyond the power of such carriers and the shipping public to control or substantially alleviate. Some class II linehaul carriers or class I beltlines are in the same position. The use of car days as the sole measurement factor, ignoring length of haul, percentage of rate divisions, or similar transportation factors, is regarded as unduly discriminatory. This is a valid observation and any ownership formula which relies on interline car days as a standard of measurement should include some moderating factors which will reasonably offset the indicated discrimination.

The principal disqualifying factor in the proposed interline car days formula, however, is its dependence on shortages of freight cars reported by respondents, in accordance with the instructions given in Section VII, Item (A), of appendix A, for the month of October 1964; these reported shortages are accepted at face value and are not adjusted in any manner to reflect cars reported as surplus. The reported shortages are the faciends used to determine the number of freight cars, by type, which would have been needed to fill the orders for freight cars to be used in local and interline service; the respective multipliers are the serviceable car days per car loaded in local or interline service as reported by respondents for October 1964 in response to other sections of appendix A. The directions for reporting shortages set out in that appendix are almost identical to those issued by the AAR in connection to its CS-44 reports of car shortages. They differ only in that the former directions, and later interpretative instructions, require reporting of some shortages not included in the CS-44 reports. For example, the respondents were required to report as short every car ordered whether the shipper desired to load it or not; they were also required to report as short a type of car not available even though another type of car was furnished and used.

It is contended by respondents that the shortages specified in CS-44 reports, or in response to the questionnaire

herein, are not reliable. Shippers duplicate orders by seeking cars for the same shipment from more than one carrier, and tend to inflate orders in the hope of receiving the lesser car supply they really need. A witness for the Bureau of Operations, who is qualified to testify concerning reported car shortages, agreed on cross-examination that based on his experience, information, and belief, reported shortages are generally overstated, and that in times of peak demand the tendency toward overstatement increases. The AAR regards the CS-44 reports as unreliable to such an extent that they reduce them by 50 percent before giving them any credence whatsoever. The indicated reduction is completely arbitrary. On brief, counsel for the Bureau of Enforcement, in an effort to rehabilitate statistics he recognizes as unreliable, suggests that the formulas proposed by the Bureau of Accounts include a similar reduction of 50 percent for the factors relating to reported shortages. This suggestion is not acceptable. Reported shortages which are admittedly so unreliable cannot be rehabilitated by such arbitrary action. Economic, competitive, and operational reactions to adoption of any ownership formula are much too substantial to be dependent on such a flimsy base.

In connection with reported shortages it should be noted also that the questionnaire which was served with the original order herein couched a request for shortage data in the following language:

> Actual average daily shortage of cars for each of the five weeks covered in Item 1(a). The shortage at all stations for each working day (Monday through Friday) totaled for the entire railroad and divided by 5 should be reported as the average daily shortage for each of the five weeks. The number of cars so reported must not exceed one-fifth of the net additional number of cars that could have been loaded (had ample car supply been available) over and above number that were actually loaded.

In other words, respondents were instructed to cancel 80 percent of the figures normally collected before reporting shortages. Such instruction clearly shows a lack of confidence in the authenticity of reported shortages.

Nothing on this record concerning reported shortages serves to reflect adversely on the following findings and

conclusions of the Commission reported in *Incentive Per Diem Charges*, *supra*, and they apply with equal force herein.

The record demonstrates that the only information which is presently available, bearing upon the need to impose an interim incentive charge, is that produced by the reports of the type made to the Association of American Railroads by class I railroads. These reports, entitled CS-44 reports, and a similar report for October 1964, made in connection with docket Ex Parte No. 241, list, at each station, the cars of various types ordered placed for loading in excess of the number actually placed, provided the orders have been unfilled for 24 hours prior to 6 p.m. of the reporting day. They also report cars on hand which are considered to be in excess of those needed to fill existing or anticipated orders for the next day. The totals for each railroad are collated by the AAR as weekly summaries, characterized as shortages and surpluses. Most of the respondents challenge the reliability of these figures. It is asserted that the surplus figures are frequently understated, particularly in periods of high car demand, and that the shortage figures are enlarged by reason of the duplication of unfilled orders carried over from day to day. These and other criticisms made by the respondents who are directly involved in the development of the data demonstrate that it can be given little weight in this proceeding.

We do not find it necessary to consider at length the contentions that this evidence is hearsay and inadmissible since, taken by itself, it is insufficient to support any valid conclusions in this case. At best, these figures indicate only that an unsatisfied demand exists in varying degree. Their probative value is not impressive and, even if they did provide a basis for a finding as to the true gap between current demand for cars by particular type and the extent to which that demand is being met, they also show concurrent surpluses of the same types. No information is presently available as to the extent to which these surplus cars could be used to meet the unsatisfied demand, or the true difference which might be treated as a guide to a present inadequacy in supply. In any event, we

must, as heretofore noted, give serious consideration to many other factors affecting the adequacy of the national freight car supply, information which has not yet been developed in relation to the present problem, and with which we may not dispense. No satisfactory basis has been established for a finding as to the car supply, by types, necessary to meet the needs of commerce and the national defense, or the extent to which any inadequacy exists which should be corrected by encouraging acquisition of particular types of cars.

The disqualification of reported shortages which are gathered in the fashion of those contained in CS-44 reports or those submitted in reply to the questionnaire herein renders the interline car days formula proposed by the Bureau of Accounts incompetent also. Since that formula contains factors requiring the use of such shortage reports, and even an arbitrary adjustment of them as between local and interline traffic, its adoption is legally, economically, and from an operational viewpoint, unsound and unwarranted.

Even if the reported shortages were not subject to the foregoing incompetencies, their use without recognition of concurrent surplusages of freight cars would be unreasonably biased. The record contains the CS-44 reports for the period from January 1, 1955 through the week of July 15, 1967. During such interval of 653 weeks there were more freight cars reported surplus than short during 526 weeks; the last week in which shortages were reported in excess of surpluses began on November 19, 1966.

The second formula described by the Bureau of Accounts, called the interline cars originated formula, is set forth in appendix D hereto. Such a formula is based on the theory that each railroad should be responsible for the ownership of enough cars to meet the requirements of local and interline traffic originating on its lines. The Bureau of Operations favors a formula founded on such theory although it does not support the particular formula proposed herein. The latter formula relies to the same extent as the interline car days formula on reported shortages. For all of the reasons stated heretofore concerning such shortage reports the interline cars originated formula which uses those reports is equally invalid, and its adoption is not justified.

It is further strongly indicated on this record that even if a reasonably accurate method of determining actual shortages was available, an ownership formula based on conditions in the past would lead surely to erroneous results. This is true because such a formula contains a count of cars and car days which includes cars that are obsolete or in various stages of obsolescence. For example, the plain narrow-door boxcar, the so-called work horse of the fleet, fits both of those categories, and as of October 1964 embraced more than half of the boxcars owned by respondents. Some shippers will not use narrow-door boxcars, and others use them only when other cars are unavailable and their traffic must be moved immediately by rail. This leads to much idle time in the utilization of these boxcars, and consequent creation of long turn-around times which, according to the Bureau of Accounts and the Bureau of Operations, consists of the elapsed time between loads. In effect, the less the demand and use of such a car, the greater the requirement will be shown for it under a formula based on the statistical past.

Preliminary statement concerning proposed regulations and car service rules. The Bureau of Operations recommends that the Commission prescribe certain regulations, and that it order respondents to publish new car service rules in tariffs. The proposals for regulations are quoted in appendix E and the proposed car service rules are stated in appendix F.

In many instances an attempt is made to support the proposed regulation or rule by an exhibit but in some instances no evidence is offered. The exhibits are generally based on reports from field agents who were instructed to seek evidence concerning so called bad practices to be used in support of the various proposals. To say that this method of gathering evidence does not produce a representative showing is a gross understatement. As a matter of fact it goes beyond a statistical bias to such an extent as to be completely weighted against the respondents and in support of a proposed regulation or rule. Or as one witness stated, the bad practices only were shown because it was assumed that respondents would present evidence relative to good practices.

The proposed regulations and rules were composed with a principal aim in mind, the most expeditions return of freight cars to owners whether they want them or not.

These rules necessarily affect relations between and among rail carriers and their shippers, or with carriers using competitive modes of transportation. These relations would embrace one or more of the following subjects: per diem, economics, marketing, traffic, statistics, finance, accounting, export or import trades, and law. The witnesses for the Bureau of Operations claim no expertise or education in such fields of knowledge, and did not ask qualified personnel in the Commission to evaluate their proposals in order to discover whether they would produce sound or lawful results. Despite the inability of the witnesses to stand cross-examination concerning the impact of the proposed regulations and rules on the respondents or shippers in relation to the foregoing subjects, the Bureau of Enforcement on brief urges that such proposals be made mandatory by the Commission.

In the following discussion the numbered proposals and car service rules are in the same order as shown in appendices E and F; they will be paraphrased when lucidity is not thereby impaired.

Proposals I and II. These proposals are that all common carriers by railroad, namely respondents and all other rail carriers who are not parties to this proceeding, file tariffs which publish the car service rules set out in appendix F, to cover operations in intrastate, interstate, and foreign commerce. If these proposals are adopted, failure to publish the car service rules in a tariff would subject respondents to the penalties provided in section 1(17)(a) of the Interstate Commerce Act. Publication of the rules in tariffs, followed by the willful failure strictly to observe such rules, would subject the offender to the penalties of the Elkins Act. Inclusion of all rail carriers under the proposals in this proceeding would be of doubtful legality as to those who are not respondents; also questionable is the assumption that intrastate commerce is within the scope of this proceeding and under the authority of the Commission.

None of the respondents or interveners on brief support the adoption of Proposals I and II, and most of them actively oppose such action. Initially it is argued by the AAR that section 1(13) of the Interstate Commerce Act limits the authority of the Commission to ordering only the publication of "their" rules, meaning rules voluntarily adopted

by the carriers. This argument is too tenuous to be persuasive. If car service rules are established under authority of section 1(14)(a) of the Interstate Commerce Act they become the rules of the carriers to the same extent as any rate, charge, or other rule which a regulated carrier is required to adopt against its will.

The need for car service rules to be published in tariffs is said to be proven by the exhibits of record submitted by the Bureau of Operations to show bad practices. The witnesses supporting such publication knew that penalties apply when tariffs are not enforced but did not know the magnitude of such penalties. When it is noted that fines under the Elkins Act are not less than $1,000, and range to $20,000, this lack of knowledge indicates a reckless disregard of consequences. Such disdain is remarkable when it is noted that all of the bureau witnesses agreed that perfect compliance with car service rules is impossible. One of the witnesses was of the opinion that compliance with the first four car service rules proposed would be good if it was made in 80 percent of the instances those rules were applicable. In view of such opinion the witness believes that the proposed car service rules should be administered with "strictly controlled flexibility". The latter concept may beguile the imagination but it does not provide a comprehensible standard of enforcement. Imposition of the Elkins Act on respondents for violation of rules would not be a reasonable regulatory action when it is done with the knowledge that as much as twenty percent noncompliance with the rules constitutes good performance.

Another major objection to Proposals I and II is that they would make the rules inflexible, and emergency changes or exceptions impossible. A change in a rule would require the filing of a petition asking that the order herein be vacated and set aside to the extent necessary to permit the establishment of a proposed changed rule. The petition and the proposed change would be subject to protest and opposition by dissident rail carriers, shippers, and carriers operating other modes of transportation. The necessary hearing guaranteed by section 1(14)(a) of the Interstate Commerce Act renders the procedure so cumbersome that emergency situations, now handled through informal agreements, between carriers or AAR car service orders, would long be over before relief could be obtained. Loss of traffic

to competitors, increased costs of operations, and unrelieved dislocation of cars are forecast by respondents if they are required to operate under mandatory rules. Their predictions are reasonable. Even with the flexibility in the rules now available to operating officials, the AAR and the Commission have judged it necessary at various times to promulgate car service orders to correct freight car dislocations; there is no basis on this record for a finding that the proposed car service rules would eliminate car dislocations or the need for car service orders. On the contrary, it is admitted that complete compliance with the car service rules would result in lesser efficiency than operations with some degree of noncompliance. It does not appear that publication of car service rules in tariffs would have a real and substantial relation to a better and more efficient utilization of freight cars in the future.

The E. J. & E., a beltline connecting Lake Michigan points to the north and south of Chicago, contends that mandatory car service rules would wreak havoc on its existing rail service. This carrier connects with ten western railroads, eight eastern lines, and seven switching and terminal carriers. A witness estimated that costs of service at five steel plants would increase $3.7-million annually under mandatory rules, and that total increased costs for the E. J. & E. under such rules would be too much to be borne.

The steel industry is opposed to publication of car service rules in tariffs. On behalf of major steel companies [3] the American Iron and Steel Institute filed a brief in which such opposition is stated in the following particulars. There are numerous steps in the processing of steel which are subject to variable conditions. This fact affects the scheduling of the products for shipment, and prevents any assurance that the order for any particular customer will be ready for loading at a specific time. The unpredictable patterns inherent in manufacturing and customer requirements for the numerous steel products of differing sizes and gauges prevents the ordering of rail cars which can

[3] Allegheny Ludlum Steel Corporation, Armco Steel Corporation, Bethlehem Steel Corporation, CF&I Steel Corporation, Granite City Steel Company, Jones & Laughlin Steel Corporation, Kaiser Steel Corporation, Laclede Steel Company, Lukens Steel Company, Republic Steel Corporation, Sharon Steel Corporation, United States Steel Corporation, Wheeling Steel Corporation, and The Youngstown Sheet and Tube Company.

be consigned to a specific destination with certitude. This is illustrated in studies made by United States Steel Corporation at one of their plants. During a period of four weeks in 1966 the freight cars loaded ranged from 87 to 104 percent of the number which had been forecast for loading each week; specific type of cars loaded ranged from a low of 55 percent of boxcar loadings forecasted to 140 percent of gondola loadings which were forecast. In one week forecasts were made 9 to 33 hours in advance for loading of 282 cars. Of that number, 129 or 44.7 percent were not loaded on the switching turn scheduled, and 124 or 44 percent were not loaded on the day scheduled.

Most of the steel companies do not maintain warehouses for finished products. Steel articles are produced in response to orders, and normally each order of each customer is different from every other order of that customer or any other customer. The customer has a particular use in mind for the articles ordered and expects immediate delivery. In other words, the steel industry produces heavy and bulky materials which are shipped in large quantities to fill orders which are unique. These characteristics show that the industry needs flexibility in using cars which are available. If required by mandatory car service rules to predict routing and destination of individual shipments to be loaded on a specific day the steel companies would be faced with a requirement impossible to meet. In fact it would not be possible to improve the accuracy of forecasting without drastic changes in processing, storage, and marketing practices. Even if such innovations are physically and economically possible, any necessary changes in consignees or destinations occurring during the day would require switching of cars previously spotted in order to replace them with cars of proper ownership for particular shipments. This would require the suspension of other loading operations on that track while the switching was being performed and result in loss of efficiency for both the carrier and the shipper. In the case of plants where inbound loaded cars are utilized when unloaded for outbound shipments, the necessary increase in switching under mandatory rules would be substantial. If the plant is among those where a large proportion of the cars used for shipments have arrived under load, the necessary increase in switching would exceed the physical capabilities

of the plant and the serving carriers beyond the point of rectification. From the viewpoint of loading crews the essential problem is that the need for immediate shipment of products upon completion of production does not afford enough time for advance specification of freight car ownership so as to permit compliance with car service rules in all instances.

The steel industry points also to the competitive aspect of any requirement that car service rules be mandatory. If rail transportation becomes a burden on shippers of steel products and their customers, diversion of traffic to other modes of transportation will occur to the fullest extent possible in an attempt to satisfy the demand for prompt transportation service.

The National Industrial Traffic League objects to the filing of car service rules in tariffs because it would create statutory relations between shippers and railroads. The league believes that mandatory rules would produce delays in rail service, wasteful railroad operations, and disruption of the shippers production and distribution programs.

In summary, this record does not afford convincing evidence that car service rules must be published in tariffs. On the contrary, the weight of the evidence, and arguments based thereon, compel the conclusion that mandatory rules would be of substantial detriment to rail carriers and shippers. Proposals I and II have not been shown to be justified.

Proposals III and IV. It is provided in Proposal III that carriers will keep daily records at open stations, yards, and terminals, on Commission-approved forms, detailing cars which are: on hand, ordered and furnished for loading, received and dispatched, and held for repairs. Proposal IV is as follows: "Carriers will maintain at open stations, on forms approved by the Interstate Commerce Commission, records of cars held by or for patrons, on which demurrage, track storage and other charges provided in demurrage tariffs are based."

These proposals are based on reports from Commission field agents concerning deficiencies in records at nine points throughout the United States which resulted in failure to charge demurrage, failure to assess the correct demurrage or switching charges, and delay in handling cars. The obvious purpose of the proposals is to provide records in the future which will forestall the described lapses. There

is no correlation between the ailment and the remedy proposed. A regulation which provides that records be kept on forms approved by the Commission would be no guarantee that they would be accurate, complete, of an improvement over present practices. On the other hand, uniform records at all open stations, yards, and terminals could be productive of much data unnecessary and inappropriate for local use.

Adoption of Proposals III and IV would be very costly for respondents. The Union Pacific estimated that the proposals would increase its annual expenses by $1,800,000 for each proposal; the Southern estimated an annual increase of $600,000 if the proposals are adopted; the Southern Pacific states that adoption of the proposals would require it to hire 600 clerical personnel to maintain such field records.

The principal objection to these proposals by respondents is that the recommended keeping of records in the field is a backward step which defeats the current trend toward use of modern communication systems to forward information from the field to a computer center. The latter method of record maintenance is preferable to manual record-keeping, and is endorsed by those respondents who are enjoying the many benefits of such computer techniques. Whenever it is necessary for information to be known in the field, during an inspection by an agent of the Commission for instance, the data can be retrieved from the computer center in a few minutes.

A computer center provides also for an accuracy in records not obtainable under the decentralized system which would be maintained under Proposals III and IV. The AAR notes the following example to illustrate the inaccuries inherent in decentralized control. A local freight train leaves an origin at night and en route to destination spots an empty car on the siding of an industry located at an intermediate point. The freight conductor turns in a wheel report at destination showing that the empty car was spotted but the agent at the intermediate point, not working at night, would have no knowledge of that fact and so could not record it. A centralized computer system, however, would have a record of the empty car spotted at the industry, and that information would be available for retrieval at the intermediate station.

Proposals III and IV not only have not been shown to be justified but their adoption, to the extent that they halted or delayed the centralized keeping of records, would have a deleterious effect on enlightened railroad management aims. The Bureau of Operations did not consider modern computer techniques for deriving information, or their effect on record-keeping, in formulating these proposals: that oversight is a substantial defect in its assessment of the situation and ultimate recommendation.

Proposal V. This proposal if adopted would require that all rules, regulations, and charges governing the holding of cars or storage of freight on railroad property by or on behalf of shippers, including track storage charges, shall be published in separate tariffs relating exclusively to such rules, regulations, and charges. The recommendation for prescription of this regulation is based on two exhibits. One of the exhibits lists 70 commodity rate tariffs, 58 of which contain rates on coal, in which detention rules are published; these rules are different than those published in general demurrage tariffs. The other underlying document in support of the proposal consists of a list of 7 carriers whose agents at 10 stations failed to comply properly with detention rules contained in specified rate tariffs. These incidents are not based on statistical random samples, and there is no showing otherwise that they are representative of occurrences at other stations on the lines of the cited carriers or at any station on the lines of other respondents.

The objective of this proposal is to remove the possibility that rate clerks will assume that a general demurrage tariff, rather than exceptions thereto in rate tariffs, will apply. Human nature not being subservient to regulations, there is no precedent for believing that agents who ignore detention rules in a rate tariff will observe such rules if they are published in a separate tariff; prevention of clerical errors is not so easily attained.

Rules governing the storage and holding of freight are based on underlying conditions which are dissimilar. Many rules are limited to a single commodity, and some rules pertain to but one station. For example, at ocean, lake, and river ports the rules, regulations, and charges cover detention of freight before or after carriage by water and are published in port terminal tariffs. The latter tariffs contain also directives or instructions concerning subjects other

than matters of detention, the object being to include in one tariff all of the services available and fees applicable at each port. If the detention rules, regulations and charges are removed from port tariffs, or other tariffs with similar objectives, the agents would have to refer to two tariffs instead of one. It is not apparent how the latter result would decrease the possibility of clerical error. The recommended action would be burdensome and expensive without any proven benefit to respondents, the general shipping public, or improved freight car utilization. Proposal V has not been proven necessary or justifiable.

Proposal VI. This proposal in ten numbered paragraphs recommends the adoption of regulations governing assessment of demurrage charges, the amount of such charges, and the length of free-time permissible in connection with loading and unloading. Reference is hereby made to appendix E for a full account of the proposal.

There is no evidence of record in support of this proposal. It is based on the simple idea that an increase in demurrage charges, and a decrease in free time, must result in an increase in freight car adequacy and utilization. Adoption of the proposal in these circumstances would not be a legally enforceable action. This fact is carefully recognized by the Bureau of Enforcement in the following language: "Although the Bureau believes that uniformity of demurrage requirements is an important aspect of car supply, any rule regarding uniformity will collaterally affect charges and the record in this proceeding is not adequate for a determination as to details of the proposal."

Although the Bureau of Operations has not attempted to sustain the burden of proof in relation to Proposal VI, a brief recital of the opposition to it will be made in order to examine the possibility that inspired prevision has revealed verities which should now be obvious to all without possibility of doubt. Paragraphs 2, 5, and 10, and subparagraph 8c consist of unnecessary disclaimers or statements of present practice.

Paragraph 1 would require publication of demurrage charges at least as high as those in Agent H. R. Hinsch's tariff 4-G, I.C.C. No. H-17, namely, $5 per day for the first four days after free time, $10 per day for the next four days, and $15 per day for each day of detention thereafter. Adoption of this recommendation would necessarily be

based on an assumption that the foregoing charges are at a minimum reasonable level, followed by the obvious deduction that any lesser demurrage charges are unreasonable to the extent that they are lower. The essential assumption has no rational appeal.

In Paragraph 3 it is recommended that all demurrage charges be based on the detention of cars, and that charges stated per unit of weight or volume be canceled. On close examination it was developed that such recommendation was not intended to cover detention or storage charges on freight which has been unloaded and stored in an elevator or on a pier. The proposal would cover cars containing freight to be unloaded into a storage elevator, or on a pier, which for various reasons cannot be unloaded. In such cases the recommended charges per car could be less than if based on a unit of weight or volume. To the extent this is true the respondents would be prejudiced by the proposal without gaining any discernible benefit in the way of freight car ownership or utilization.

Paragraph 4 is akin to paragraph 1 in that a supposition must be made without thought being given to the consequences. It is proposed that except for traffic governed by Agent H. R. Hinsch's tariff 8-M, I.C.C. No. H-13, the maximum free time before applying demurrage shall be five days. This proposal is vigorously opposed by the coal industry and port interests. It is pointed out that the amounts of free time are based on actual need as shown by experience over the years, and differing amounts thereof have been among factors considered in establishing freight rates. A maximum free time of five days would be ruinous to the export trade in coal, and would seriously increase the balance of payments problem for the United States. Ten years ago the maximum free time allowed on coal traffic was 7 days and the largest vessel held about 17,000 tons. Today the free time for loading coal ranges from 7 to 12 days, and the largest vessel will hold 85,000 tons. Contracts are made by coal exporters to cover deliveries for 10 years and the penalties inherent in an arbitrary reduction of free time to 5 days are beyond possible economic absorption. Adoption of the proposal would work serious economic harm also on carriers and those engaged in transshipping coal at Great Lakes ports, particularly in the accumulation period immediately prior to the opening of the navigation

season each year. The proposal is without evidentiary basis and has no apparent merit. In any event, a prescribed change in free time should be preceded by a thorough investigation such as that in the recent proceeding reported in *Free Time In-Car Storage at U.S. Ports*, 329 I.C.C. 763, concerning free time on cars containing lading other than coal, coke, phosphate rock, potash, and grain.

Paragraph 6 is corollary to paragraph 1, and would require that all demurrage tariffs, except those covering detention at coal mines, provide demurrage charges equal to or greater than those in Agent H. R. Hinsch's tariff 4-G, I.C.C. No. H-17. For the reasons stated in the discussion of paragraph 1, this recommendation is unjustified.

Under Paragraph 7 the free time at coal mines would be cut from a maximum of 60 days to 30 days, and minimum charges would be those in Agent H. R. Hinsch's tariff 4-G. The witness advocating this proposal admitted that he had submitted no testimony or documentary evidence to support the suggested change. There is no way on this record to estimate whether adoption of the proposal would be beneficial to car supply or utilization. Without giving consideration to possible consequences to shippers and carriers under the proposal, its adoption would be completely arbitrary and legally unfounded.

Paragraph 8A contains provisions which would require all demurrage tariffs to be described in an item or list of exceptions published in Agent H. R. Hinsch's freight tariff 4 Series. Respondents state that the cross-referencing of thousands of special detention arrangements, and the filing of supplements thereto on an almost daily basis, would be a tremendous task to no good purpose since the resultant lists would be so voluminous as to make the tariff unmanageable. Additionally, respondents are in the process of accomplishing the aims of Paragraph 8A by adding a new section to the tariff 4 Series describing all categories of special demurrage charges and rules. Reference in rate tariffs may be made to such categories. The latter method is preferable to the impractical recommendation in Paragraph 8A.

In Paragraph 8B it is recommended that demurrage tariffs other than the 4 Series must contain appropriate revisions of average agreement rules. One of the purposes of establishing special demurrage rules in tariffs other

than the 4 Series is the elimination of the application of any average agreement in order to improve car utilization. The only average agreement rules published are in tariff 4 Series, and the provisions of Paragraph 8B are unnecessary.

Paragraph 9A would provide for uniform demurrage rules, regulations, and charges at all ports on export, domestic, and intercoastal traffic. No evidence was submitted in support of such uniformity, nor was it explained why import traffic was exempted from the proposal. Domestic traffic, particularly at river ports, is faced with none of the disabilities which at times arise in connection with export traffic. As stated in *Decreased Free Time Allowance*, 64 I.C.C. 400, "The circumstances and conditions which are controlling in the case of traffic moving through ports are substantially dissimilar from those which obtain in connection with domestic traffic. Many of the factors which tend to delay traffic intended for ocean movement do not exist in the case of domestic traffic."

Of the other recommendations in Paragraph 9, some are unnecessary or a restatement of existing practices, and others are impractical or ambiguous; none are supported by any evidence or testimony to suggest a necessity for their prescription.

Proposal VII. Opposition from respondents and intervening shippers was more widespread to this proposal than to any other. Under the proposal no carrier shall publish or participate as an origin carrier in any freight rates unless it owns, leases, or otherwise controls sufficient equipment of the kind required by its tariff provisions, to be used to transport the traffic anticipated. No evidence was submitted in support of this proposal, and there is no indication otherwise that the proposal is in response to any existing or anticipated car supply problem.

During cross-examination it was developed that the proposal does not impart the intent of the framers. Specifically, it was revealed that the proposal was not intended to apply to increases or reductions in the monetary amount of existing rates, but only to new rates or to a change in an existing carload minimum weight which would require the use of freight cars of a size not owned, leased, or otherwise controlled in sufficient numbers to transport the traffic anticipated. No amendment or modification of the proposal was

suggested, however, and the original recommendation for prescription of the proposal stands despite the fact that it admittedly does not communicate the intent of the proponents. Further discussion of the proposal must be based on the assumption that the necessary modification to reflect the real views of the Bureau of Operations is subject to intelligible translation, but that such transference is not procedurally proper at this time.

Restriction of the proposal to new rates or increased minima, while exempting decreases in present rates, appears to the AAR to be a strange scheme. It is noted that a decrease in rates, for example on a commodity moving in large volume, will be directed toward and often rewarded by an increase in traffic accompanied by a need for more cars. On the other hand, a new rate may be on a commodity moving in small volume which is only partially susceptible to rail movement.

The proposal does not by its terms disclose how the "traffic anticipated" is to be determined or who is to make that determination. On cross-examination it was stated that the responsibility for ascertaining the traffic anticipated rested with origin carriers. The ability to forecast production schedules of shippers, how much of that volume will be shipped, where the shipments will be consigned, how much of the traffic will move by rail, and finally how much will be routed via the rail carrier making the determination, requires a prognostic skill which few if any carriers have attained to the degree which this proposal would require. The proponents were unable to suggest how the respondents could measure the traffic anticipated, or how the Commission would proceed to make an intelligent judgment as to the validity of any measurement made by respondents. The clause "traffic anticipated" in Proposal VII creates substantive problems with no indication of record that they are soluble. If not solved they could either block administration of the proposal or frustrate efforts by respondents to establish rates as required in the performance of their responsibilities as common carriers.

The phrase "owns, leases, or otherwise controls sufficient equipment" became obfuscated during cross-examination. A supporting witness was asked whether the proposal would prohibit establishment of new rates if the traffic anticipated required 500 cars and the origin carrier owned,

leased, or otherwise controlled a total of 350 cars. The reply was in the affirmative but the witness stated also that he had not intended for the proposal to bar tariff publication in such circumstances. In any event the requirement to own, lease, or otherwise control sufficient equipment runs counter to a policy of the Commission as evidenced in a recent decision. The report in *Permian Basin R. Co.—Construction*, 330 I.C.C. 256, is concerned with an application to construct and operate a line of railroad in Texas extending from Odessa to a point near Seagraves. In considering such application the Commission was aware that the applicant did not own, lease, or otherwise control any freight cars but intended to rely on connecting lines and shippers for cars. The application was granted. Thus, the present policy of the Commission does not disfavor rate publication or rail operations without adequate car ownership or control.

The provision in paragraph C(2)(c) of the proposal debars prescription of such proposal until such time as a freight car ownership formula is established by the Commission. This is true because it provides that the adequacy of ownership of general service freight cars shall be determined under such formula. In the event that an interline car days formula is established, it would become necessary to consider a revision of paragraph A so that the onus of ownership would not fall entirely on the originating carrier.

Respondents contend that numerous cases of preference and prejudice would arise between and among intermodal carriers and shippers under Proposal VII. This is true, and there would be no way to eliminate the discrimination in some instances. For example, competing manufacturers at the same origin could be located on the lines of different rail carriers, one of which has an ample supply of cars to haul a new product and the other carrier not owning, leasing, or otherwise controlling an adequate number of cars to haul the traffic anticipated.

Some of the carriers take note of the fact that the proposal would prevent rate experimentation in the form of incentive rates. The Southern mentions that the proposal would have prevented establishment of the well known Bib John grain rates which are described and finally approved in *Grain—Multiple Car Shipments, South*, 318 I.C.C. 641, 321 I.C.C. 582, and 325 I.C.C. 752. These rates have

operated to the substantial benefit of shippers, receivers, and the Southern.

In the foregoing circumstances the mildest conclusion that can be made concerning Proposal VII is that it has not been shown to be justified.

Proposal VIII. Under this proposal a carrier, required by its tariff to unload carload freight, must place an embargo against additional shipments to any destination when the number of cars to be unloaded at such point exceeds the number that can be unloaded within the next 48 hours. The regulation also prohibits cancellation of the embargo until the number of cars to be unloaded is less than the number that can be unloaded in the next 24 hours, and provided further that none of the cars awaiting unloading has been so held for more than 24 hours; in computing cars that can be unloaded in 24 hours the unloading record for the past four weeks is to govern.

This recommendation would deprive respondents of the right they have always exercised to initiate embargoes. As stated in *Baltimore Chamber of Commerce* v. *B. & O. R. R. Co.*, 45 I.C.C. 40, 53 "The act to regulate commerce does not inhibit the declaration of an embargo by a carrier, and the advisability or the necessity of declaring embargoes is a matter of policy to be determined in the first instance by the carrier. *Penna. R.R.* v. *Puritan Coal Co.*, 237 U.S. 121, 133. Our jurisdiction is limited to determining the lawfulness of the practices in this respect and to requiring, after full hearing, the establishment and maintenance of such regulations or practices as we may find to be just, fair, and reasonable, ***." See also *United States* v. *Metropolitan Lumber Co.*, 254 Fed. 348. No evidence or testimony was introduced to show that the respondents have been derelict in initiating embargoes, or that the arbitrary formula proposed would be beneficial in any respect. On the contrary the respondents testified as to the unnecessary traffic disruptions and harm which would ensue under the proposal.

Freight car utilization will be decreased if the proposed formula for embargoes is adopted. This should be particularly true in connection with the exportation of coal. At Newport News, Va., for example, the formula would necessitate declaration of an embargo when a coal transshipper is accumulating a cargo of sufficient volume to load vessels which normally serve that port. It would be necessary to take such arbitrary action even though the carrier serving

Newport News had facilities adequate not only to handle the traffic of the aforesaid transshipper but much greater volumes of coal and other commodities. Specifically, in August and September of 1966 it would have been necessary to apply the formula and embargo coal shipments to Newport News on several occasions even though the coal handled was but about 50 percent of the dumping capacity of the delivering carrier. The same unnecessary disabilities would occur at all other ports where coal is handled in great volume.

As recognized by the Commission in *Lake Coal Demurrage*, 232 I.C.C. 735, the railroads have supervised transfer of coal at certain Great Lakes ports [4] through an agency known as the Coal and Ore Exchange. This agency has effectively regulated and facilitated the movement and transshipment of coal for the past 50 years; certainly there is nothing of record to indicate otherwise. Imposition of an arbitrary formula would serve only to unduly hamper the essential functions of the Coal and Ore Exchange and probably destroy export trade in coal moving through the ports it supervises.

The Illinois Central would have had to embargo the port of New Orleans during the last half of October 1966 if Proposal VIII had been in effect. Under the 24-hours embargo-cancellation rule the foregoing embargo could not have been lifted as to the port if the lateness of one vessel had caused a delay for more than 24 hours in the unloading of one freight car; not until that particular car had been unloaded could the embargo have been canceled as to other freight cars the Illinois Central was obliged to unload into the same or other vessels. The Illinois Central points out also that at New Orleans freight arriving on its line is unloaded at its dock or at the dock of two other carriers. In such circumstances, which are not unique but prevail at other ports, it would not be practical for a delivering line to be obliged to secure and depend on the records of other rail carriers in order to determine whether to issue or cancel embargo notices.

On behalf of itself, as well as other carriers [5] faced with

[4] Toledo, Sandusky, Lorain, Ashtabula, and Conneaut, Ohio, and Port Charlotte, N. Y.

[5] Duluth, Missabe and Iron Range; Soo Line; Lake Superior & Ishpeming; Northern Pacific; North Western.

similar operating conditions in transshipping iron ore, the Great Northern presented the following testimony. At present the Great Northern has a very substantial surplus of cars used in the transportation of iron ore. This surplus is attributable to a decline of 44 percent in iron ore traffic since 1956. The surplus cars are not suitable for other traffic except to a limited extent in the movement of sand and gravel. An embargo of the iron ore movement on the Great Northern could not, obviously, increase car supply to the general shipping public. The service on iron ore traffic necessitates the accumulation of loaded cars at classification yards near lake docks. Classification and switching of cars occurs in response to specifications of shippers interested in proper blending of the ore to meet the requirements of blast furnaces at steel mills. The foregoing services are provided by the Great Northern continuously, and there are about 2,700 loaded cars on hand at any one time during the shipping season. About 2,800 cars can be unloaded in a period of 48 hours and, therefore, Proposal VIII would present no problem to the Great Northern if vessels always arrived on time. They do not and at times due to their late arrivals the Great Northern has as many as 4,000 loaded cars on hand. Such number cannot be unloaded in 48 hours and if the proposal is adopted the loading of iron ore into cars at the mines would have to be embargoed. This would not only require a shutdown of mining operations but would interfere also with the loading of vessels which arrive at later dates. In a navigational season about 1,000 iron ore vessels arrive at the port of Allouez, Wis., which is served by the Great Northern. The witness sponsoring Proposal VIII admitted on cross-examination that application of such proposal to iron ore traffic would not be beneficial.

The evidence strongly indicates that adoption of Proposal VIII would harm respondents, shippers, and connecting water carriers without producing any counter-vailing good; the proposal has not been shown to be justified.

Proposals IX and X. Respondents will be required to file monthly reports with the Commission, if Proposal IX is adopted, describing the cars in assigned service and telling about their use during the prior month. Under Proposal X respondents would be required to furnish the Commission

weekly reports showing average daily shortages and surpluses of freight cars by type. The use, if any, which would be made of these reports is not revealed. Assuming that the proponents of these proposals have some use in mind for the reports, the parties and the Commission should have been informed of such intent so that they would have a chance to exercise their respective opinions and judgments in the matter. Approval of the proposals would require unwarranted assumptions that the reports could be used, would be used, and if used could reasonably be expected to be productive of some improvement in car supply or utilization. Additionally, insofar as Proposal X is concerned, as described in detail hereinbefore, the reported average daily shortage statistics are inherently erroneous. There is no logical basis for requiring respondents to furnish such data.

Aside from the foregoing the respondents observe correctly that Proposals IX and X would impede the establishment of real time information systems for the assessment of current car supply problems, and would require the expenditure of substantial amounts of time and money to collect a mass of information for which no use has been shown. The proposals have not been shown to be justified.

Proposed car service rules. Much of the opposition to some of the proposed car service rules is based on the recommendation in Proposal II that the rules be made mandatory by publication in tariffs. Since that proposal has not been shown to be justified, a major part of the opposition by respondents to rules or portions thereof need not be repeated in detail. The proposed car service rules are set forth in appendix F hereto; consideration of them will be directed to whether respondents should be ordered to observe them without tariff publication.

Some of the proposed rules are not recommended for prescription but are presented on a voluntary basis, the carriers having the option of whether to adopt them. As to such proposed rules, namely those numbered 5, 6, 9, and 10, the respondents prefer their version of similar rules; no further comment on these rules is needed or appropriate in the premises.

During the course of this proceeding a new code of car service rules was approved by the AAR and a substantial majority of its members; they believe the new rules to be an improvement on the rules in effect when this proceeding

was initiated. The new code became effective on October 1, 1967, and it is reproduced in appendix G hereto.

Proposed car service rule 1.—This rule is identical to a rule which was dropped from the AAR code of rules when the new code was recently made effective. The rule provides as follows: "Home cars shall not be used for the movement of traffic beyond the limits of the home road when the use of other suitable cars under these rules is practicable."

The proposed rule is inconsistent with an ownership formula, such as that authorized by the Board of Directors of the AAR, based on the theory that carriers engaged in handling interline traffic should own a pro rata share of the freight cars needed to carry such a volume of freight. For that reason the AAR could not include the rule in its new code. Operating without such rule in effect now permits lines who originate less traffic than they deliver to purchase cars with the knowledge that they will be permitted to load them in interline service. The latter fact is not true under proposed car service rule 1 which obliges such carriers to use foreign cars first when their use under the other car service rules is practicable.

To support rule 1 the Bureau of Operations cites an exhibit of record which shows the percentages of box cars, owned by class I railroads, which were located on each owner's lines at biweekly periods since January 1, 1947. The range is from a low of 16.1 percent in April 1947 to 51.4 percent on May 15, 1958; on only five other dates, all in 1958, did home cars on line reach as much as 50 percent. The percentage of home box cars on line is not shown to be a barometer for percentage of other types of cars on line. Therefore, the cited statistics as to box cars, even if otherwise persuasive, could not be convincing that proposed rule 1 should control movements of all freight cars. There is, however, no explanation which correlates percentages of owned box cars on home lines and rule 1 as proposed. That rule does not insure a prompt and speedy return of cars to their owners. In theory the absence of such rule offers at least as much, and possibly more chance for a car to be returned to its owner promptly than with such rule in effect.

Proposed car service rules 2 and 3.—The wording of proposed rule 2 is identical to that in the present AAR car

service rule 1; the same is true to proposed rule 3 and AAR rule 2 with the following addendum in paragraph 2(b) of the latter rule: (Car Selection Chart is designed to aid in so selecting cars for loading). A car selection chart would be of assistance to shippers and carriers, and to that extent the AAR rule in effect is an improvement over the proposed rule.

In regard to the notes to proposed rules 2 and 3 compared with notes to AAR rules 1 and 2, note (A) of those proposed is not duplicated in the present AAR code because it is superfluous; shippers who are authorized by tariffs to reconsign cars do not need further permission in a note to car service rules. The AAR notes to rules 1 and 2 also contain note (B) which is not in the proposed notes, and do not include note (C) which is in the proposed notes. Note (B) seems to be a reasonable contribution toward a fair administration of AAR rules 1 and 2. As to proposed note (C) the respondents are opposed to its inclusion in any code of car service rules. For convenience of reference note (C) is reproduced below.

> (C) Exceptions to these rules may be authorized by the Car Service Division, Association of American Railroads, subject to approval of the Interstate Commerce Commission. Requests for exception must be in writing and must contain a full statement of the need for the exceptions. When approved by the Commission such exceptions shall be published in this tariff.

The provisions of this note would lock the carriers into the same inflexible status as would be created under the mandatory conditions recommended in Proposal II discussed hereinbefore. Many and various operating conditions present practical needs to deviate from present car service rules 1 and 2. These instances do not have a predictable pattern or occur with regularity but must be handled promptly. Recourse in writing to the Commission and the necessary wait for approval could frustrate effective action by railroad operating officials.

To illustrate benefits derived from technical departures from AAR rules 1 and 2, (proposed rules 2 and 3) the following operating conditions were shown. Southern Pacific has a surplusage of cars in Texas at times when the Santa Fe is experiencing a deficit of cars in that area. On the

other hand, at the same time the Santa Fe may have surplus empty cars in the San Joaquin Valley of California. An exchange of empty cars is negotiated by telephone conversation or telegraphic exchange, the interchange between carriers occurring at convenient junctions in Texas and central California. The transfer of empty cars is not restricted to those owned by the principals, and the receiving line assumes the normal responsibility to handle the cars in accordance with car service rules. There is, of course, a violation of AAR rules 1 and 2 when the interchanges take place but such violation produces improved car utilization by way of less empty car-miles and car-days.

Other departures from strict observance of the present rules 1 and 2 are authorized by various car service orders and car distribution circulars issued by the AAR to improve car distribution and utilization on a national scale by direct or expeditous return routing of empty cars.

The proposal for the prescription of note (C) does not include any discussion of the inherent dilatory aspects. To be of any benefit a permit to depart from AAR rules 1 and 2, or proposed rules 2 and 3, must be obtained promptly. By the time compliance with note (C) is made the reasons for the requested exception would no longer prevail. The tariffs would be filled with exceptions, if approval was granted, which could not be used for the original purpose proposed. In time, however, there would be enough exceptions established to cover all imaginable situations; then operating officials would again be free to depart from rules when common sense so dictates. No good purpose would be served by frustrating efficient rail operations while going through a cycle of tariff publication to reach the plateau of management existing today; note (C) to proposed rules 1, 2, and 3 should not be prescribed.

In the absence of note (C), proposed rules 2 and 3 would not be an improvement over AAR rules 1 and 2, and there is no convincing reason which prompts their prescription by an order of the Commission. In other words, prescription of such rules, or any other car service rules which are duplicative of the present AAR rules, has not been justified by any evidence which is persuasive that such prescriptive orders would produce improvements in car supply or utilization. On the contrary, for the reasons stated in connection with Proposal II, prescriptive orders which are

issued for the sole purpose of making car service rules mandatory produce numerous effects harmful to the carriers and the shipping public.

Proposed car service rule 4.—The rule proposed is: "Acceptance from shipper of cars loaded in violation of Rules 2 and 3 herein is prohibited." This tersely stated rule has caused widespread unrest among shippers; it is opposed by respondents and those shippers who discussed the matter.

The record shows, and neither respondents nor intervening shippers deny, that rules 1 and 2 are frequently violated because respondents are tendered loaded cars with routing instructions which are inconsistent with such rules. The reasoning in support of proposed rule 4 is that rules 2 and 3 promote efficient car utilization, and that rule 4 will eliminate a major cause for the violation of such rules.

The proposed rule is inflexible, and no exceptions are permitted or suggested by its sponsors. Prior to presenting opposition by individual shippers, the following summary outlines their views. Production, marketing, and shipping practices would be disrupted; there would be a tremendous increase in costs; diversion of traffic to other modes of transportation would be necessary; strict compliance with the rule is not possible; freight car utilization would deteriorate and this would produce less efficient rail service at higher costs to the carriers.

The opposition of the steel industry to proposed rule 4 is basically the same as to Proposal II discussed hereinbefore. If production schedules for iron and steel articles were a matter of precision, and if originating carriers had the ability to supply freight cars of the ownership ordered, the extra switching of cars required under rules 2 and 3 would be beyond the trackage limits of steel companies, and in some cases the switch yards of respondents, to accommodate. This lack of space could not in most cases be eliminated because room for expansion of tracks and creation of storage facilities is not available; steel mills were designed for a steady flow of raw materials in and finished products out.

A study made by Inland Steel Company during a period of 55 hours in September 1966, midnight to seven o'clock on the third morning, offers a comparison of actual car usage with what would have been necessary if proposed

rule 4 had been enforced. The comparison is typical at this plant or at those of other steel producers. There were 368 loaded cars and 140 empty cars switched from the plant; the empty cars were switched because they were bad order, dirty, or in excess of need. Of the loaded cars, 245 had been switched to the plant empty, and 123 had arrived under load. If the proposed car service rules had been applied to the traffic shipped 120 cars would have been consigned in compliance with the rules, 133 other loads could have been placed in cars and routed in accordance with the rules, and 115 loads, of 31 percent of the traffic, could not have been consigned under the rules in the cars available. This would have necessitated the release of 255 empty cars, instead of 140 cars, and the receipt of 417 empty cars instead of the number actually received. Of the outbound cars there were 141 which were moved in accord with routings ordered by the customers; under the foregoing hypothetical compliance with the car service rules only 52 cars, or 37 percent, could have been consigned in compliance with such routings. If the foregoing study is projected to an annual basis the affiant's costs would be increased about $400,000. Its inability to use 31 percent of the empty cars available for loading would necessitate additional storage facilities for lading while inappropriate cars are switched out and the correct ownership is located and switched in by connecting carriers; space for such storage is not available.

On behalf of the steel industry it is stated by the American Iron and Steel Institute that only because car service rules are not strictly enforced as to shipments from steel mills do they produce car utilization as well as which occurs; and that strict enforcement of the rules is not compatible with rendering the service needed.

The Gypsum Association filed a statement on behalf of its members who consign about 98 percent of the gypsum products shipped in the United States. Competition in the sale of gypsum products is so keen that the ability to effect prompt delivery to customers is a necessary committment in making sales. Orders for gypsum products are filled and shipped no later than the day following their receipt. The ordering of a specific freight car ownership in advance, under such short lead time, is not possible. If rule 4 is prescribed the respondents could not realistically compete for the traffic because specialized motor carriers, who have

sufficient equipment available adjacent to plants of the producers of gypsum products, would be used. The supply of cars would be improved to the extent that none would be needed to haul gypsum products, but this affiant doubts that such a drastic remedy is required.

The Manufacturing Chemists' Association, Inc., is opposed to the prescription of rule 4 which is regarded as requiring impractical loading practices without insuring any improvement in car utilization. Chemical plants have been designed in response to a market demand for shipments to be made within hours of orders for products. Customers have individual problems and requirements. This results in orders for chemicals tailored to each customer's demands. In distributing products to such customers it is not possible to order cars in advance according to specific routings and destinations, nor is it practical to adjust loading schedules to accommodate cars available for loading on any particular day. In order to give the prompt deliveries required by competitive forces it is necessary for chemical companies to order cars in advance of receiving orders. Enforcement of proposed rule 4 would result in rail service inadequate to meet the requirements of the chemical industry.

The National Association of Shippers Advisory Boards stated that many shippers would divert traffic to competing modes of transportation if rule 4 is adopted. Although such diversion could result in the application of higher rates, it could also produce lower total costs due to elimination of the delay incident to inflexible compliance with the rules. Some members of the association believe that application of the rules under all circumstances would double car handling at their plants, with resultant increases in applicable switching charges and costs of administration.

The Coal Traffic Bureau of Northern West Virginia, Ohio & Western Pennsylvania observes that the coal mining industry has customarily loaded a portion of its production into cars before the identification of consignees is known. This practice reduces handling of cars by producers and carriers. If the coal industry must determine in advance the movement of cars it would result in added costs, and waste of car-days without discernible benefit to anyone.

The National Industrial Traffic League states that it is not possible for its members, whether operating a single

plant or engaged in multi-plant production at points throughout the United States, to conduct efficient shipping programs if prohibited by proposed rule 4 from loading contrary to rules 2 and 3. Examples of present violations which it is alleged must not be prohibited in the future by adoption of proposed rule 4 were listed by the league as follows. 1) A car unloaded at a plant and suitable for loading products of that plant should be available for loading, regardless of ownership, in the interest of efficient utilization of equipment. Switching of the aforesaid car out, and another car in, would increase empty car-days and impair car utilization. 2) Midwestern shippers receive raw materials from eastern territory in cars owned by carriers who originate the traffic. Finished products are shipped westbound; rules 2 and 3 prohibit loading of the inbound cars. In contrast, competitive producers of the same products located in the East have the use of cars owned by originating lines for movement of their products to customers in the Western States. 3) Shippers learn by experience the normal transit times over various available rail routes. Sometimes the fastest transit time is not by way of a route embracing the lines of the owner of a car spotted at the shipper's dock. It is also possible that the owning line is not a party to the lowest rate applicable from that origin. Obedience to the rules results in a longer time in transit, and possibly the application of higher freight charges. 4) Large industrial plants which conduct their own switching operations would experience an immediate and sharp increase in operating expenses if proposed rule 4 is prescribed and enforced. 5) Many plants have more than one track used for loading. Today the respondents switch empties to all of the loading tracks without discrimination as to ownership. Enforcement of rules 2 and 3 would not permit such an efficient method of switching, and exigencies at the plant or errors on the part of the order clerk could require that cars switched to a particular loading be pulled because they were not of the proper ownership. 6) Changes in consignment from one customer to another frequently become necessary after a car is loaded for shipment which would be in accord with the rules. For example, a Southern car is loaded at Omaha for shipment to Atlanta when the plant receives notice from its headquarters to send a carload immediately to a customer in Seattle. If

plant production is equivalent to but one carload a day the lading would have to be unloaded from the Southern car, and the car would have to be pulled and replaced by an empty car owned by a western line. The shipper loses the ability to serve customers in an efficient manner, empty car-days are generated, and distribution of products is delayed. 7) For a number of reasons, none of which are specified by the league, a shipper may not wish to have a car routed via the car owner's line. Enforcement of rule 4 would deprive the shipper of the present ability to route shipments without consideration of car ownership. 8) The enforcement of rule 4 will cause shippers to divert traffic to other modes of transportation, particularly when a rail car of proper ownership is not readily available. This will cause a decrease in respondents' revenues.

The respondents make reference to the new car service rule 3 which requires each originating carrier to use reasonable diligence to see that foreign cars are loaded or handled in accordance with the provisions of car service rules. They join with the shipping public in stating that the various and many problems of freight car utilization can best be met if there is a permissible flexibility in the application of the car service rules as dictated by common sense, good faith, and experience. The term "reasonable diligence" in the present rule 3 allows the exercise of such flexibility.

Any possible improvement in the utilization of freight cars under proposed rule 4 is necessarily problematical. A conclusion that any improvement would in fact ensue is not warranted in the face of the evidence presented by intervening shippers. In the absence of such a conclusion there is no reason to adopt such rule, whereas in consideration of the detrimental effects which would flow from its adoption and enforcement there is cause to reject it. On this record the rule has not been shown to be justified.

Proposed car service rules 7 and 16.—These rules would regulate in various ways the operating practices of the respondents. They will be discussed together for convenience because much of the evidence in opposition is duplicative.

The evidence submitted in support of proposed car service rule 7 consists of an exhibit listing the total cars checked by field agents of the Commission on various days in

August, November, and December 1965, and January 1966, at 16 terminals and interchange points, in 10 States, on the lines of 10 rail carriers; 5,419 cars were at such points, of which 1,189 cars or 21.94 percent had been delayed in excess of 24 hours. The various causes of the delays are not shown. Thus, it is not known of record how many of the delays, if any, would not be included in the exceptions to paragraph (B) (1) of proposed rule 7. If all of the delays shown are excusable under the rule, or if an inconsequential number of them are inexcusable, the evidence in support of such rule obviously must be regarded as unconvincing of a need for prescription of the rule. There is no basis on this record for a conclusion that any of the delays would or could have been eliminated had proposed rule 7 been in effect, nor that the experience shown is representative of that at: other stations on the lines of the 10 carriers inspected; stations on the lines of other carriers; other times during the year.

Reference to AAR car service rule 7 shows that it is similar to proposed rule 7 but leavened in paragraph (B)(1) with the provision that the required interchange be made "with due regard for efficient and economical railroad operating practices or conditions beyond the carriers' control." This provision, in contrast to the mandatory and inflexible requirements recommended, is regarded by respondents as essential in order to respond adequately to fluctuating volumes of traffic, surpluses of various types of cars, or other operational vagaries.

Under proposed rule 16 the carriers would be required to obey detailed regulations concerning the placement, removal, forwarding, repair, movement, and holding of freight cars. Evidence in support of the rule consists of that submitted in connection with proposed rule 7, plus the following described evidence which is likewise not shown to be representative.

A record was made concerning 288 boxcars loaded in May 1964 at a plant in Cleveland, Ohio, which is served by two of the respondents. The cars were held an average of 5.3 days by the respondents before being placed for loading. Of the 288 cars loaded, 67 cars were owned by the respondents who serve the plant and these would not have been covered had proposed rule 16 been in effect. It is of interest to note though that the latter cars were held 5.7

days on the average before placement. If the home cars are subtracted from the total, the average holding for placement of foreign cars is reduced to 5.2 days. Consideration of this evidence should also be directed to the long hauls that were generated for respondents by holding the cars beyond the recommended period of 24 hours; 97 cars, or one-third of those loaded, were consigned to destinations in Florida, Texas, or the Pacific Coast States.

Reliance cannot be placed on the foregoing evidence as a basis or reason for prescribing proposed rule 16 unless it be blindly assumed that under such rule the release of the foreign cars 4.2 days earlier on the average would have resulted in some improvement in car utilization, or some greater benefit to respondents, shippers, or the public interest. Similar comments are warranted as to cars held empty by a terminal switching line at Barberton, Ohio prior to placement for loading at an industry located at that point; in June 1964 the times that freight cars were held empty prior to placement at the industry were 0.68 days for 441 plain boxcars, 3.67 days for 42 equipped boxcars, 2 days for 6 gondolas, and 4.8 days for 71 covered hopper cars. No evidence is available which shows why covered hopper cars were held empty awaiting placement seven times longer on the average than plain boxcars.

One exhibit submitted in support of proposed rule 16 is a summary of 64 reports by Commission field agents concerning placement of cars for unloading at various destinations throughout the United States. A total of 21,257 cars were surveyed at different times during the period from November 1964 to January 1966. Of that total 1,948, or 9 percent were delayed one or more days prior to placement for unloading. The causes of such delays are not shown so the responsibility for them is unknown on this record. A similar type of exhibit summarizes 54 reports concerning removal of loaded and empty cars from tracks serving shippers or receivers at various points throughout the United States. There were 17,197 cars checked and delays were noted as to 965 cars or 5.6 percent of those checked. These delays included a count of every day even though daily switching might not be given by the carrier surveyed. In the latter instances proposed rule 16 could not change the situation unless the carrier concerned insti-

tuted switching every day even though the traffic available is insufficient to meet the additional costs incurred.

The percentages of freight cars owned by class I railroads and held for light repairs, namely repairs which require 20 man-hours of labor or less, are shown for each month in the years 1958 through 1965. The annual average of cars so held in relation to ownership ranges from 1.504 percent in 1958 to 4.260 percent in 1965. The lowest percentage shown is 0.971 as of January 1, 1966. A check was made in November 1964, and subsequently, at 12 locations on the lines of 10 carriers to secure information as to performances on individual lines in making light repairs. A total of 1,783 cars were checked, and 439 cars were found to have been delayed in excess of 24 hours for placement, repair, or removal after repair. The causes for the cited delays are not shown so it is not possible to deduce whether the proposal recommended in rule 16 (4) could have been obeyed. For example, delays are shown in the placement of cars for light repairs at Whitefish, Mont., during January 1966; the location and time of year should cause speculation as to whether the weather conditions were such that repairs could have been made within 24 hours as required by proposed rule 16. The fact that repairs can always be made at some locations within 24 hours does not warrant an assumption that they can be made as expeditiously at all locations without regard to the climate. The proposal in paragraph 4 of proposed rule 16 appears to have been conceived arbitrarily.

Agents of the Commission, at various times in the period September 1964-January 1966, checked 1,395 cars being held for prospective loading or distribution on the lines of 21 carriers at 43 stations in 21 States. The average length of time the cars were held was 9.43 days. There is no breakdown to show the number of cars owned by the holding line. This data was not secured in accordance with a statistically sound random sampling method and it is not otherwise competent to prove that proposed rule 16 must be prescribed for application on all railroads; at most it shows only that at a certain time and location a particular rail carrier held a car or cars, owned or foreign, for so many days.

Respondents point out that the evidence submitted in support of proposed rule 16 is so biased from either a

statistical or substantive viewpoint that it does not support a valid projection as to a saving of car-days if the rule is prescribed. The recommendation assumes that respondents would be able to obey the rule; no consideration is given to the diversity of operating conditions which prevail. Many interchanges must occur at metropolitan centers where congestion and lengthy cross-town switches are encountered. Often the switch movements are confined to certain times of the day under ordinances or other local conditions. In 1964 the out-of-pocket costs for switching service ranged from .57 cents to 77 cents per yard-engine-minute, and switch movements must be planned with such costs in mind.

Carriers receiving cars in interchange at major junctions schedule outbound service on the basis of normal receipts. It would be futile to make a special interchange switch movement to the receiving line, as could be required under the proposed rule, because that carrier will not run a special train to haul one car.

The following reasons are submitted by respondents to support their contention that it is necessary to accomplish interchanges without any fixed time limitation such as the period of 24 hours stated in proposed rule 16: 1) at some local stations agents are not on duty Saturday and Sunday, and cars arriving on those days are interchanged on Monday; 2) weighing of cars; 3) cars released by shippers after industries have been switched; 4) at some small interchange points, service is not provided on weekends and cars released Friday or Saturday cannot be interchanged until Monday; 5) traffic interruptions, weather conditions, bi- or tri-weekly service; 6) in large terminals, the necessary switching and yard-to-yard movements required by the carrier on which interchange cars develop make it impossible to interchange cars within 24 hours; 7) inability of receiving carrier to accept cars; 8) bad orders; 9) yard congestion; 10) circuitous interchange movements; 11) lack of interchange track capacity for peak or unusual movements; 12) volume movements of grain taking delivery on other than the inbound carrier; 13) license and entry permits required on cars moving to Mexico; 14) clearance of overloads and extreme dimension cars; 15) employee errors; 16) city ordinances restricting switching movements to certain hours of the day.

At certain times and places during peak seasonal movements of grain or perishable commodities such as lettuce, the movement of empty cars necessary to accommodate the traffic is beyond the yard facilities of the carriers to handle within 24 hours.

With respect to the car repair provisions recommended the respondents contend that they are unrealistic in not recognizing the difference between facilities available at major terminals and those at remote stations. It is further contended that the necessity to have employees to handle peak conditions would mean that some employees would be idle at other times.

Paragraph (6) of proposed rule 16 is strongly opposed by respondents. No rational explanation was submitted to justify its adoption. The proposal makes no distinction between low-rated and high-rated commodities, nor is it recognized that low cost rather than rapidity of service is a competitive factor favoring rail transportation of certain commodities. Enforcement of a movement of cars whenever 40 cars, loaded or empty, became available would have a substantial affect on carriers' costs.

The respondents point out that if empty foreign cars cannot be held for more than 24 hours for prospective loading there is little chance that they will be used because it could take that long for cleaning, inspection, and grading. Car supply at way stations and country points would be further complicated because at such origins they rely for a supply of empty cars on major terminals where repair and cleaning tracks are located; under the proposal there would be little chance that foreign cars could properly be scheduled for consistent timely arrivals at stations remote from major centers of rail transportation. For example, boxcars which are used to transport ammunition from Thorne, Nev., must be inspected at points which are 275 miles or more away. The supply of empty cars to outlying stations is dependent on forecasting the volume of traffic to be moved and, in most cases, the direction such movement will take.

The shipping public is opposed to proposed rules 7 and 16. They believe that enforcement of such rules would result in more cars being moved empty than would be available for revenue shipments. Bethlehem Steel Company cites the example of shipments of pipe to pipe-stringing contractors. This type of traffic moves in great volume. If origin

lines are not permitted to assemble cars in advance of such movement, the needs of the contractor for uninterrupted deliveries cannot be met. United States Steel Corporation stated that a limitation of 24 hours on the retention of empty cars held for prospective loading would result in an inability on the part of rail carriers to consistently supply enough cars to support the fluctuating needs of the steel industry. Wheeling Steel Corporation agrees with the latter statement and states further that the rule would fail to benefit orderly car distribution while creating havoc with the production of steel.

The evidence herein does not support a prescription of proposed rules 7 and 16. In conclusion it is to be noted that in the new car service rule 18 the respondents seek the same goal as the Bureau of Operations, improved car utilization, but believe that it is essential to use reasonable diligence in administering the rule and not to be bound to an inflexible and arbitrary time limitation.

Proposed car service rule 8.—This rule would require each railroad, including those not parties to this proceeding, to become a party to Agent H. R. Hirsch's freight tariff 4-G, or successive issues thereof. The latter tariff is entitled Car Demurrage Rules and Charges—Storage Rules and Charges. Publication of other tariffs concerning demurrage and storage would be permited provided reference to them was made in items of exception in Hirsch's tariff.

The provisions of this proposed rule duplicate the requirements of Proposal VI, paragraph 8A. For the reasons stated in connection with the discussion of what proposal it appears that adoption of proposed rule 8 is unwarranted, and prescription of the rule has not been shown to be justified.

Proposed car service rules 11 and 13.—Under proposed rule 11 the carriers could no longer waive or reclaim per diem, mileage or other car rental charges on empty cars en route to, held en route to, or held empty at points of unloading. Proposed rule 13 governs the assignment of cars to shippers for their exclusive use. Any assignment must be preceded by a written request from a shipper at least 10 days before the intended use, The cars assigned are to be subject to demurrage rules applicable to cars held for loading from date of actual or constructive placement until released. Cars may not be held empty en route to

loading points except upon written instructions of the assignee, in which case they are subject to demurrage. Within 24 hours of arrival at holding or loading points, exclusive of days exempted from demurrage under the governing tariff, the carriers must actually or constructively place empty assigned cars.

The purpose of these proposed rules is stated to be the enforced improvement of practices relative to assigned or controlled cars by restricting such practices and by providing records which will enable the Commission to maintain better surveillance of such practices. On brief it is stated that terminal switching of line-haul traffic, and dependent class II line-haul carriers and switching and terminal companies should be exempted from proposed rule 11, and that an exception to proposed rule 13 should be granted for cars held for loading due to lack of orders for placement during seasonal fluctuations in traffic; the wording of such exceptions is not suggested. The foregoing recommendation on brief would change proposed rule 13 so substantially that it amounts to a concession that the rule as proposed is unjustified. The admitted need for such an exception casts doubt on the competency of the studies submitted concerning assignment of cars because there is no way to evaluate that evidence so as to reflect retroactive application of such an exception.

More than half of the exhibits introduced by the Bureau of Operations in this proceeding pertain to assigned and controlled cars, and are the basis for the recommendation by the bureau that proposed rules 11 and 13 be prescribed. These exhibits consist of a summary of 28 reports from field agents concerning pools of assigned cars at various points, 14 reports each directed to a specific assigned car pool, and 5 reports concerning the handling of controlled cars at specific points.

A summary of 28 reports made concerning the holding of assigned cars during various periods of time in 1964 and 1965, and at locations throughout the United States, shows that 3,892 cars were held for loading an average of 6.3 days. This fact is not contrasted with the holding of unassigned cars at such times and places.

The utilization of 74 equipped boxcars assigned to a manufacturer of carpets for installation in automobiles was obtained for the year 1964. The manufacturer is located at

Albemarle, N. C., and 55 cars in the pool were assigned by the home road. These cars are equipped with interior devices designed for efficient loading and safe transportation of automobile carpets. In order to use the cars in general service it would be necessary to remove some of the devices and install others. During 1964 the average turn-around time for 74 cars was 23.7 days, reflecting 15.2 trips per car. These statistics, standing alone, reveal nothing about whether the cars were utilized efficiently or mismanaged. Details were reported concerning 7 of the cars which were loaded 92 times. On 44 occasions the cars were placed for loading on the same day they arrived at Albemarle, and in 28 other instances they were placed on or before the third day. The plant at Albemarle shuts down in July or August each year when the automobile manufacturers are closed for model changeovers. The carriers state that it would be uneconomic and impractical to recall the cars from the assigned pool, send foreign cars home and rehabilitate the other cars for general service. By the time the cars would be ready for use it would be necessary to reverse the process and equip them properly for the carriage of automobile carpets.

Sixteen equipped insulated boxcars, assigned to the transportation of canned goods from St. Paul, Minn., were loaded 132 times in the last six months of 1964; in 24 instances the cars were utilized for return loads. The turn-around time was 20.1 days on the average, and at St. Paul the cars were held an average of 4 days from arrival to placement for loading.

At Winston Salem, N. C., there were 165 cars assigned to the transportation of cigarettes; on 95 of the cars the turn-around time was 23.9 days, and on the other 70 cars the turn-around time was 22.5 days. The carriers who assigned the cars state that the carriage of cigarettes must be accomplished in a clean, odorless car. Prior to establishment of the assigned car pool it was necessary to steam-clean each general purpose car before its use. The cleaning resulted in unused car-days and did not eliminate rejections of cars by the shippers as not being suitable for the transportation of cigarettes. This traffic is of high value, as much as $200,000 per carload, and it is imperative that clean cars be provided. Only by assigning cars to this service can they be protected from other loadings of a contaminating nature.

A study was made of car pools at two auto parts plants in Kokomo, Ind., for the period July 1964-February 1965. One pool of 17 cars had an average turn-around time of 19.6 days and the cars were held an average of 8.1 days before being placed for loading. The other pool of 91 cars had an average turn-around time of 27.1 days and the cars were held for prospective loading an average of 9.2 days. This study admittedly presents a situation where the assigned car pools were oversubscribed. During the eight months immediately after the conclusion of the bureau's study, the volume of business increased; at one plant the average loadings increased 86 percent and the average turn-around time was reduced by 24 percent.

Another study of 36 assigned cars related to a pool at Evansville, Ind.; 58 loadings were examined. The average prospective loading time was 11.3 days, and the average turn-around time was 41.1 days. One foreign car was held idle, free of per diem and not subject to demurrage, for 109 days; a home car was similarly held empty for 90 days. This pool of assigned cars is a perfect example of both oversubscription and absence of supervision by the participating carriers. If this pool was truly representative of normal assignment practices the proposals in rules 11 and 13 might be justified.

An origin carrier maintains a pool of 14 boxcars at El Segundo, Cal. for the use of a shipper of petroleum products. In January 1964 the prospective loading delays ranged from 1 to 18 days and averaged 9.1 days. A recheck of this pool showed that prospective loading delays on cars furnished in February 1965 ranged from 7 days to 35 days, and averaged 17.5 days. In the period February 1 to March 10, 1965, there were as least 5 cars, and as many as 10 cars, empty in the pool at El Segundo. No cars were loaded on 24 days, 1 car was loaded on 12 days, and 2 cars were loaded on 2 days.

A pool of 64 boxcars maintained at Watervliet, N. Y., for the transportation of paper was checked for utilization during February 1964. Times that the cars were held for prospective loading ranged from 1 to 51 days, and averaged 6.3 days.

One of the larger pools of assigned cars is maintained at Appliance Park, Ky., for the shipment of electrical appliances from the manufacturer at that point. The station is

served by two railroads. In February 1964 there were approximately 1,300 cars in the pool, and data concerning the utilization of 132 cars during that month was shown of record. The selection of the latter cars was not accomplished by a statistically approved method of random sampling. They were held an average of 3.29 days for prospective loading. These cars were loaded 252 times and an account of 181 round-trip movements, not selected by random sampling, produced an average turn-around of 21.7 days. One of the origin carriers stated that it is essential to provide the shipper with suitable equipped boxcars or the traffic will not move by rail. Such cars are not made empty in the area on the lines of that carrier and only by the assignment cars is it possible to be competitive for the traffic. The indicated holding time for prospective loading is not regarded as excessive since it is computed from time of arrival of an empty car in the Louisville, Ky., area and may embrace two switch movements in Louisville, a switch movement to Appliance Park, intraplant handling, cleaning, and loading. The fact that the shipper cleans the cars saves the carrier the costs of yard engine switching and manual labor for cleaning; the shipper does not clean unassigned cars. The turn-around time on the cars studied is not regarded by the carrier as having any relevancy in connection with transportation efficiency because the cars move to varied and distant destinations.

An assignment of 24 cars at Hawthorne, Cal., accumulated an average detention of 10 days per car originated, and an average turn-around time of 38.5 days. The cars were under the supervision of a subsidiary of the Southern Pacific and the parent company discontinued the assignment in 1965. Southern Pacific now has a computer system in operation which permits a supervision of car pools not possible in 1964.

Study of a pool of 56 assigned cars at Cleveland, Ohio, shows an average time of 5.6 days that each originated car was held for prospective loading, and a turn-around time of 27 days per loaded movement. The latter figure is inflated because the study did not give credit for [illegible] of some of the cars in other service before return to Cleveland.

The bureau analyzed the utilization of 254 covered hopper cars and 9 boxcars, assigned to an industry at Barberton, Ohio, during June 1964. The hopper cars were

held for loading an average of 3.7 days and the boxcars were held an average of 3.9 days; respective turn-around times were 26.5 days and 28.1 days.

Prospective loading times averaging 6.3 days per car loaded in May and June 1965 occurred in a pool of 104 cars at Joliet, Ill. Individual delays ranged as high as 43 days, and 13.8 percent of empty arrivals were held 10 days or more before placement.

Utilization of 35 boxcars assigned to a movement of copper anodes from Garfield, Utah to Baltimore, Md., and from Tooele, Utah to Grasselli, Ind., during the first eight months of 1965, was studied. Average time held for prospective loading was 7.6 days, and the average turn-around time on 93 of 148 movements was 37.5 days. When the study was ended there were 23 cars on hand which had been held for loading an average of 24.7 days. The originating carrier replied to this study by stating that the loading requirements for the industries served are cyclic and that 35 cars are needed for the intermittent shipping cycles. It is not feasible to release cars in general service because they are of special construction to permit the heavy concentrated floor loading weights which are experienced in the transportation of lead and copper ingots. General service boxcars will not withstand such service, and from an operational viewpoint it is not safe to use them. It is necessary to maintain the availability of the special heavy-duty freight cars for this transportation.

The following evidence in support of proposed rules 11 and 13 pertains to controlled cars which usually have special characteristics. A controlled car is not permitted to be loaded in general service but only by a shipper designated by the owner of the car; such control of the car is exercised whether the car is located on or off the lines of the owning carrier. The types of closed cars which are controlled include hopper cars, insulated cars, and cars with cushion underframes, interior loading devices, or exceptionally large cubic capacity; open cars include special flat cars. When cars are detailed to a shipper at an off-line point in advance of the time that it is to be loaded, the holding line may reclaim per diem but demurrage does not begin to run until the shipper orders the car. The practice of using controlled cars began about 1950; it offers competitive advantages to off-line carriers and service advantages to

shippers. The following instances concerning the use of controlled cars were shown by the Bureau of Operations.

Seven cars were sent empty from Richmond, Va., to an off-line station, Roanoke Rapids, N. C., where they accumulated 52 car days in the period April 6-May 11, 1965, with one car not yet then placed for loading. The serving line was authorized per diem reclaim for 45 of those days. In rebuttal to the foregoing the shipper testified that the 7 cars studied were those with the longest delays, and if all controlled cars used during April had been counted the average time before placement would have been 3.7 days. Two practices, since corrected, led to undue delays on some cars. Unassigned cars were placed when controlled cars were available for placement, and the local agent, for the sake of convenience in switching, had ordered the last cars in switched out first.

A check of controlled cars at Bloomington, Ind., on the lines of two carriers was made on October 13, 1965. Fourteen foreign controlled cars were held by each such carrier. One carrier had held the cars an average of 9.2 days, and the other carrier had held the cars an average of 23.1 days. The latter experience in the wooing of traffic betrays unwarranted confidence in or subservience to the shipper, or poor judgment by responsible employees of the foreign lines.

Eleven controlled cars held for loading of paper at Georgetown, S. C., collected an average of 7.1 days awaiting placement in October 1965. Fourteen controlled cars accumulated an average delay in placement of 8.4 days during May 1965 at Cleveland, Ohio. Forty-two insulated equipped boxcars owned by three western carriers constituted a pool of controlled cars at Watervliet, N. Y.; these cars were placed for loading in December 1964 and January 1965 after being held an average of 15.5 days.

The foregoing evidence does show instances indicative of poor utilization of assigned or controlled cars. There is rebuttal evidence from shippers and carriers who deny that such evidence is representative and characteristic of car pools, or that utilization of assigned and controlled cars is not as good or better than that of unassigned cars.

The Grocery Manufacturers of America, Inc., is an association of the leading producers of groceries. By 1960 it became evident to the members that damage to mixed

carload shipments of groceries was increasing at an alarming rate. The traffic committee of the association drew plans for a boxcar with restraining devices and temperature controls which would reduce damage to grocery products and permit heavier loading. Carriers adopted the suggested specifications and have been providing such cars in assigned pools; this has benefited both shippers and carriers. It is the position of the grocery shippers that lengthy transit times, rather than delays for prospective loading, cause poor freight car utilization. A study by the major grocery companies located throughout the country, and embracing more than a thousand movements in the summer of 1966, shows delays in transit amounting to 42 percent excess of the time scheduled.

The Manufacturing Chemists' Association, Inc., contends that assigned car pools which are properly planned will permit better car utilization than is possible with the use of unassigned cars. General Motors Corporation, Chrysler Corporation, and Ford Motor Company state the same opinion; they also believe that proposed rules 11 and 13 are so impractical that assignment of cars to the automobile industry would no longer be possible if such rules are prescribed. The latter company uses a computer to monitor its use of assigned cars. When the system is completely operational it is expected that each car will average one trip per month more than were made per car in 1962.

Southern Pacific denies that assigned car practices promote inefficient car utilization, or that assignments are necessarily for the primary benefit of the shipper. It is noted that sometimes cars are assigned to a particular service, and other times cars are assigned to a particular shipper. When cars are assigned to a service it may be because a commodity shipped in large volume from a certain origin area requires a specific type of car, or because a particular traffic pattern is discernible which can best be served by an assignment of cars. The assignment of cars to a service improves their utilization by insuring that a regular supply of the necessary type of car is at the origin where needed; this reduces empty car-miles and switching which otherwise would be accrued in a random search for cars with the proper characteristics. Of the equipped boxcars owned by Southern Pacific 39 percent are in assigned service. In an overlapping period of 12 months during

1965-1966, equipped cars assigned by Southern Pacific to the carriage of appliances averaged .2 loads per month whereas similar cars in unassigned service average only .3 load per month.

It is stated by Southern that proposed rule 11 would diminish car utilization and the efficiency of the national fleet; carriers would be reluctant to accept foreign cars. As to the utilization of assigned cars on the Southern, in September 1966 such cars averaged 1.68 loads; cars assigned to the automotive service averaged 1.91 loads. During the same month the national average for all cars, assigned, unassigned, and private, was 1.47 loads.

The experience of the carriers relative to the utilization of assigned cars in comparison to general purpose cars is that the former spend less time on repair tracks and are not subject to as much interior damage. Less cleaning of assigned cars is needed particularly in the case of cars assigned to carriage of a particular commodity. The lesser amounts of time spent on cleaning or repair tracks, and movement in regular patterns of service, produce less switching and empty mileage than is true of cars without a definite home terminal.

Respondents believe that assigned car pools are essential to their financial welfare. These pools have not only prevented the diversion of high-rated traffic but have resulted in the recapture of such traffic from other regulated and unregulated modes of transportation. The continuing development of computer systems will be reflected in improvements in the assignment of cars to pools, and in their use. For example, installation by the L & N of computerized control of specially equipped cars has produced substantial gains. One group of flatcars now average .5 load more per car each month, and a group of damage-free boxcars averages .4 load more per car each month.

The respondents are not unconcerned about per diem reclaims and improvements in the utilization of assigned and controlled cars. They have studied the possibility of limiting per diem reclaims but have concluded that facts which would permit a reasonable limitation are not yet available. The carriers did, however, adopt and establish the new car service rule 16 which provides for: 1) centralized responsibility for, and control over, the operation of car pools by the home road; 2) furnishing of information

by the AAR to contributing roads as to the size and composition of the pool so that foreign lines can observe performance and have the knowledge necessary to take corrective measures.

There is nothing inherently unlawful about the assignment of cars and the weight of the evidence shows that assigned car pools have become competitively essential to shippers and carriers. There is no discrimination shown herein as between shippers in the assignment of cars; numerous assignments of one or two cars are in existence.

The evidence submitted by the Bureau of Operations was accumulated on a selective basis so as to afford some support for recommended rules 11 and 13. These rules are so inflexible that continued assignment of cars, or use of controlled cars would no longer be economically feasible on the part of either carriers or shippers. In view of these circumstances and the establishment of AAR car service rule 16, and in recognition of the statements on brief by the Bureau of Enforcement that exceptions should be made to proposed rules 11 and 13, it does not appear that a sound basis justifying their prescription has been shown. Any conclusion to the contrary would require an assumption, not warranted on this record, that if any car pools could manage to survive the proposed rules they would be operated with a utility and efficiency not possible under the AAR rules now in effect.

Proposed car service rule 12.—This proposed rule relates to car orders and instructions concerning the release or holding of cars. Such orders and instructions would be in writing, or if orally given they would be confirmed in writing within 24 hours. Orders for equipment to be loaded would be required to state the kind, size and number of cars wanted on a date certain, for the loading of a specified commodity to be transported to a named destination over a described route. Other provisions of proposed rule 12 require switching lines to furnish or arrange for cars loaded to points in the switching district, and forbid the switching carrier from furnishing its own cars for a line-haul movement when foreign cars are available for use in accordance with car service rules.

Respondents regard the rule as impractical since much of the information required on car orders is not available to the shippers when orders are placed. The carriers did

establish AAR car service rule 15 which is similar to proposed rule 12 except that information in car orders is to be recorded by the carrier and is to be supplied "if available." Another exception is that switching carriers are not prohibited from furnishing cars of their own ownership for interline movements. Such prohibition was omitted because respondents believe it would dissuade switching carriers from augmenting their ownership of cars so as to contribute a fair share to the national car supply.

Lumber and agricultural products are often sold in transit. For instance, produce grown in California is shipped to the East with only the knowledge that it will be sold to a dealer in one of the metropolitan cities on the eastern seaboard. While en route the broker makes a sale and the final destination then becomes known. In some instances, the latter destination may be cancelled by a diversion order because in the interim such point has received an oversupply. Proposed rule 12 would preclude such marketing practices without any consideration of the public interest in the matter.

As stated earlier herein, the sale of gypsum products has become so competitive that shipments must be made within 24 hours of orders for the products. This competitive requirement makes it normally impossible for the shipper to know destinations, routes, or rail carriers in advance of ordering cars. Motor carriers would not be bound by the restrictions proposed in rule 12 and the rail carriers could not remain competitive for gypsum products traffic if such rule is prescribed.

The chemical and steel industries also regard proposed rule 12 as impossible to follow in most instances because of a lack of timely knowledge. Production cycles are based on customer demands and the rail carriers try to be flexible enough to meet the transportation needed. There is no way possible for those industries to schedule their production to fit in with the availability of freight cars. Prescription of proposed rule 12 would frustrate all but a minimal use of rail transportation.

The weight of the evidence is persuasive that the provisions of AAR car service rule 15 embody the maximum requirements that are practical and reasonable in connection with the subjects covered in proposed rule 12. In

other words, the latter rule has not been shown to be justified.

Proposed car service rule 14.—This rule prohibits the holding of cars at any point between origin and destination except by reason of six conditions specified in the rule. As to two of such exceptions notice must be given within 24 hours, in the manner prescribed in applicable demurrage tariffs. No evidence was submitted relative to holding of freight cars by respondents at intermediate points. Nevertheless the respondents believe that the objective of the rule, namely the prohibition of intentional delays without tariff authority, is commendable. This belief led to the establishment of AAR car service rule 17 which prohibits holding of cars at intermediate points, with the same exceptions specified in proposed rule 14, plus the overall exception, that the rule be administered with due regard for efficient railroad practices; the requirement for giving notice was not incorporated in the AAR rule. The establishment of this rule voluntarily, and the lack of any evidence in support of the more stringent and inflexible rule proposed, warrant a conclusion that the recommendation should not be adopted. The prescription of proposed car service rule 14 has not been shown to be justified.

Proposed car service rule 15.—The proposed rule reads as follows: The acceptance of instructions requiring the movement of freight via specific internal routes of a single railroad is prohibited except where necessary to accomplish services specifically authorized by applicable tariffs. When such services are instructed by shipper or consignee the originally applicable tariff charges must be assessed regardless of subsequent cancellation.

There was no evidence introduced in support of this proposed rule. A regulatory agency cannot properly prescribe a rule without assigning some reason in support of such action. Additionally, as contended by respondents, the proposed rule would conflict with the statutory rights of a consignor to route shipments by way of authorized routes and of a carrier to haul such shipments; current regulations governing the cancellation of tariffs.

Epilogue.—During the course of the hearing the respondents testified to cooperative action they were taking relative to location, utilization and procurement of freight cars. This consists of the initiation of two systems with the

acronymous titles TRAIN (TeleRail Automated Information Network) and ACI (Automatic Car Identification.) The former system covers the establishment of a computer center in Washington, D. C., which is scheduled to become operative early in 1969. This center will be linked by a modern communication network to the participating lines, and instantaneous exchange of valuable operational data between the center and individual carriers, or between carriers by way of the center, will be possible. Direct communication between carriers is, of course, possible today.

The ACI plan will provide for the attachment of coded labels to each freight car. Wayside automatic scanning machines will read these identification labels as they move by at speeds ranging to 80 miles per hour and communicate such data to the carriers' computers. This automatic fact gathering will permit individual carriers to report daily to the TRAIN computer center a record of each freight car on line and those cars delivered and received in interchange. A master car location file will be maintained at the center which will reflect the latest reported location by railroad of every car in the national fleet.

Along with the development of TRAIN a consulting firm will establish a system of data analysis for use by the AAR in performing its car distribution functions. Scientific methods of data analysis will be defined so that the AAR will be able to anticipate imbalances in car supply and take preventive action. For the first time the railroad industry will have timely and accurate car information available. This will enable them to substantially increase utilization of cars through efficient empty car relocation to supply loading points. The industry will have also the capacity to know and analyze actual car usage, and thus be much better able than before to plan purchases of equipment. Carriers will have the requisite knowledge to avoid future improvident purchases of freight cars which become obsolete many years before they are fully depreciated in a physical sense.

Summary, conclusions and order.—Upon considering all of the evidence the hearing examiner finds that the record does not contain competent evidence upon which to base a conclusion as to the adequacy of freight car ownership; and that the adoption of the proposed car ownership formula, regulations, and car service rules has not been shown to be justified.

Premises considered, it is the order of the hearing examiner that in the absence of a stay or postponement by the Commission on the timely filing of exceptions, the effective date of this order shall be 30 days from the date of service thereof; and that this proceeding be, and it is hereby, discontinued.

Dated at Washington, D. C., this 29th day of December A. D. 1967.

By the Commission, William J. Sweeney, Hearing Examiner.

H. Neil Garson
Secretary

(SEAL)

[26] Q. Mr. Kline, would you direct your attention, please, sir, to your Exhibit No. 5?

A. Yes, sir.

Q. As I understand it, Mr. Kline, that exhibit, at least on page No. 1 of it, is simply a compilation of certain reports made by railroads to the Association of American Railroads, is that correct, sir?

A. That is correct.

Q. Are those reports commonly referred to as CS-44 reports?

A. Yes, sir.

Q. Mr. Kline, did you make any type of study for an independent check of the accuracy of those reports?

A. I did not.

Q. Is it not true, Mr. Kline, that you yourself know and believe that the shortages reported in those reports are seriously overstated?

MR. BYBEE: Just a moment. I object to that. I don't think that is Mr. Kline's testimony. If you want to characterize his testimony, let's have it accurately.

EXAM. SWEENEY. He didn't say it was his testimony.

MR. DUKE. I asked for his belief, Mr. Bybee.

MR. BYBEE: I withdraw the objection.

THE WITNESS: These reports are issued by the Association, and they purport to show the reported average daily freightcar surpluses and shortages. The accuracy is something that is [27] entirely up to the AAR, it is not up to me.

Q. (By Mr. Duke) Do you not believe, and haven't you previously testified before this Commission, that those reports are seriously over-stated?

A. I have testified to this extent, that the AAR themselves in using these figures cut them in half because they think they are overstated. My opinion on this I do not think is too important.

Q. Well, I want your opinion, Mr. Kline.

A. All right. They say they are overstated. They probably are if they say so. I don't know. There would be no way I could check on these, whether they are accurate, inaccurate or what. The only way we could determine this would be to

send out our field man. We do not have the men, nor the money to do it. There is no way we could determine how accurate they are.

Q. But you do not recall testifying in Ex Parte 252 that these reports are overstated?

A. Yes, I testified they are overstated. I testified the AAR themselves cut them in half when they use them in their determination as to what the shortage is.

Q. Did you not also testify, Mr. Kline, that it was your experience, information and belief that car shortages are generally overstated in the reports?

A. Yes.

* * * * *

[30] Q. (By Mr. Yoke) Have you previously testified with respect to these shortage reports, Mr. Kline, that you know it is not accurate but you don't have anything else?

A. Yes, I have testified to that.

Q. Did you also testify that "There is not too much connection between car shortages as reported by shippers and their shipments"?

A. And their shipments? I think that is correct, yes.

Q. Did you also testify that your men have turned in reports any number of times of elevator men with plugged elevators that had a siding that would hold five cars and they were still ordering 20 cars a day?

A. That is correct.

* * * * *

[32] A. That is correct. Now, continue on what we are talking about. We are talking about making up of the questionnaire on this thing. When we made up these questionnaires, this was the statement that was made, yes.

Q. Weren't you talking about the shortages reported to the AAR?

A. Yes, that is what I said. If you read on, we are talking about preparing this questionnaire that was sent out in 241.

Q. Is that the source of your Exhibit 5?

A. No.

Q. I thought ——

A. It is not the source of any exhibit. This thing you are talking about here is when the questionnaire for the shortages in 241 was made up. Our Director at that time said the shortages were unreasonably high and we would change the wording in the question for information.

Q. What shortages were unreasonably high, that you just mentioned?

A. Boxcar shortages in particular.

Q. Reported where?

A. To the AAR, by various railroads, on CS-44A.

Q. Does your Exhibit 5 rely on any questionnaire?

A. It relies on CS-44A, and so states at the bottom, that is [33] the source, the weekly reports of the Association of American Railroads.

Q. Which you just said to me you know are way overstated.

A. That is correct. But what else do you have? You don't have anything.

Q. I am not fighting with you.

A. This is something that comes up every time you have one of these things.

Q. In those few questions I just asked you, where we referred to a director of your Bureau, who is that director, Mr. Kline?

A. In this instance I was speaking of my immediate superior, Mr. Paul Reider.

* * * * *

[37] Q. Mr. Kline, with respect to whether or not you believe there is an overstatement in the CS-44 reports, didn't you previously testify that based on your experience you believed there was an overstatement in the CS-44 reports?

A. I did.

Q. And that you don't know how much of an overstatement there is?

A. I do not. There is no way I could know, no.

[54] (By Mr. Ribe) What is the—I believe, first, you stated previously that you are inclined to agree with the AAR that these figures are overstated.

A. Yes, sir.

Q. Do you agree with them that the proper measure of overstatement is—50 percent reduction would mean 100 overstated—is that they are 100 percent overstated?

A. Not necessarily.

Q. Will you please explain what you mean by that?

A. Well, as a result of investigations by our men at times we have found they were way overstated. Other times we find they are not. Without an investigation, no, I would not say so.

Q. You have found investigations where they were not overstated?

A. Yes, sir, we have found where they are not overstated.

Q. What is the foundation for your belief that on balance these shortages do reflect an overstatement?

A. First, the fact that, for example, when the grain harvest is in full swing your shortages will go up unreasonably, they are unreasonable in the increase in shortages. And some of the local elevators that only have, say, a three-spot track will order continuously every day 10 cars, when they could not possibly load 10 cars.

[55] Q. In making that answer you are assuming, then, that the AAR instructions require to be reported as short the difference between what is furnished and everything the shipper orders?

A. No, sir. No, sir. That agent would have no way of knowing that. In other words, the shipper calls the agent, says, "I want to ship 10 cars". I don't believe it is the business of that agent to go there and see whether or not he can spot 10 cars. That is not his business. He has been told, "We need 10 cars", and to the best of his knowledge that is what they need.

Q. I did not ask you that question.

A. No.

Q. I asked if it was your understanding that the AAR instructions require him to report that as short regardless of his knowledge that the shipper may not need that many?

A. Their instructions I don't know what are, I don't know what they report under their instructions, no.

MR. RIBE: I believe that is all I have.

* * * * *

[60] Q. In your testimony in dealing with reported shortages you did not in any way offset any of those shortages by reported surpluses, did you?

A. No, I did not.

Q. To the extent that surpluses are reported in one area and shortages in another area of the country, and they counterbalance each other, would this in your mind indicate a dislocation of the car supply or inadequate car supply?

A. It would probably be a dislocation of cars.

* * * * *

[100] Q. Do you think that the AAR CS44 statistics as to car surplus have any value at all?

A. They certainly have. They show where a railroad reports [101] that they have more cars on line than they need, than they can load.

Q. Do you think these statistics are equal in validity to the car shortage statistics reported on that form?

A. I do.

Q. Would you say, generally speaking, that there is not a car shortage in a week in which the nation's railroads report more cars surplus than they report short, that that would be true as a general rule?

A. In that instance it is dislocation of equipment. There is a shortage reported all right, but it is not actually a shortage, because it is cars that need relocating.

Q. You would say at least for that week that there is not a nation-wide shortage?

A. No, there is not.

Q. And if that occurred, that situation occurred, where there was reported a greater number of surplus cars on the CS 44 Form than there were cars short, if that situation persisted through half the year or so, you would say that there was not a persistent or chronic shortage nation-wide for that year, would that be a fair evaluation?

A. That is correct.

Q. Now, there is a quotation at the bottom of page 2, and I wish you would note, of the remarks of Commissioner McChord, made in 1916, in which he indicated that there was no [102] parallel to the car distribution problem at that time.

Are you suggesting that the difficulties at the present time are of that nature?

A. No, sir.

Q. Well, it says that these remarks are generally applicable down to the present day. Actually, there have been many times of tremendous car surplus since 1916, have there not?

A. All the way through the depression there was, yes, because there was no business.

Q. Right. And there have been other times since the war, perhaps not so common, but times when there were tremendous car surpluses, have there not?

A. That is correct.

* * * * *

[108] Q. And is it possible that the figures in 1955 and 1956 are based on so few covered hoppers that the type commodity carried in covered hoppers has changed drastically and that could cause the difference in figure?

A. Yes. The figure increase in covered hoppers started about 1958.

Q. In the case of stock cars, you say there is less demand, therefore the turn-around time has increased. I think in the case of covered hoppers we might say that at least possibly the change in type of commodity, type of loadings in them, has caused an increase in turn-around time. How do you tell what factors caused these things? Have you done any studies that indicate this?

A. No.

Q. Is there any statistical basis on which you could make that determination?

A. No.

Q. Do you know of any information available to allow us to ascertain such factors statistically, and their influence?

A. No.

* * * * *

[132] Q. That did not enter your considerations here in determining the obligation of the railroad? You were not qualified?

A. Not to say how many cars they are going to buy, no.

Q. No, that is not really the question.

You are not qualified to say whether or not they are able to buy cars, whether they are economically able to buy cars?

A. No, I am not.

Q. All right.

And there is nothing in this third full paragraph on page five which indicates that because they have a certain level of gross revenue that they ought to buy a certain number of cars, or maintain a certain percentage of ownership?

There is no implication of that in this paragraph, is there?

A. No, sir.

Q. Is there any implication that a certain level of tons originated results in an obligation to maintain a certain level of cars?

There is no implication of that in this paragraph, is there?

A. We have not said anything about tons originated yet,

outside of the fact that there was a 2.9 percent decrease in tons originated.

[143] Q. One of those factors that is necessary is a report of car shortages.

A. That is right.

Q. Is it not necessary, in order to have a meaningful study, to have a study in terms of the commodities to be transported?

A. I don't know whether it is or not. I expect it would be desirable. It would certainly be highly desirable?

A. Highly desirable, right.

Q. You don't know whether it would be absolutely necessary?

A. No, I do not.

Q. Would you say there exists any completely reliable statistics anywhere in the industry as to car shortage?

A. No. I think the 44A is as good as you have. In fact, it is the only thing you have. The only thing you have other than that is hearsay. Hearsay is the only other thing you have.

Q. The only thing other than that you have is judgment? That is what you mean, is it not?

A. That is correct; and hearsay inasmuch as you will have calls from maybe one division on a railroad, or maybe one railroad, saying, "We are desperate for cars". Other than 44A that is all you have. You don't have anything else.

Q. But you do not contend that 44A is completely reliable, do you?

A. Not absolutely, no. There are too many factors in it.

Q. In that respect, we have discussed in connection with your [144] Exhibit 6, several of the factors that can affect turn-around time.

A. Yes.

Q. There are a great many factors that can affect turn-around time, aren't there?

A. That is correct.

Q. There is no way to know which of those particular factors is causing the statistical result, is there?

A. I think not, no.

Q. So necessarily any interpretation of those statistics that would be made would be a guess? An informed guess, perhaps, but a guess, nevertheless?

A. That is correct.

* * * * *

[179] Q. So to the extent that these exhibits are compiled from AAR sources, you simply don't know, or can't answer questions as to what went into them and what did not go into them?

A. No, I cannot.

[180] Q. I believe in respect to one exhibit we covered the Class II ownership. Some of these exhibits do include Class II railroad car ownership, don't they?

A. I don't know of any, no.

Q. Let me withdraw the question, please, because I think I asked it so generally that it would not be very meaningful to you.

As to the AAR exhibits, in the sense that these exhibits were derived from AAR statistics, you do not know whether they omit or include Class II ownership, is that correct?

A. I do not know.

Q. But as to the other exhibits which were compiled directly from Commission statistics, you would be able to tell me, wouldn't you, whether they included these Class II ownerships?

A. Yes, sir.

Q. And, as a matter of fact, Exhibit 1 was compiled from Commission statistics, wasn't it?

A. Yes, sir.

Q. Does that include those Class II ownerships?

A. No, sir. The heading is Class I railroads".

Q. Right.

* * * * *

[196] Q. * * * let's start with this preliminary, this foundation question: The railroads carried, roughly speaking, about the same amount of traffic in 1964 as in 1955, did they not?

A. Not quite, but very nearly.

Q. Roughly speaking. Perhaps not quite as much in 1964, but just about?

A. That is correct.

Q. And the railroads took full advantage of this gain in average capacity of cars by reducing the fleet in about the same proportion that the capacity of the—the aggregate capacity of the fleet increased?

A. That is right.

Q. They took those cars out of the fleet. They maintained, perhaps, the ability to move that 1955 freight but they did it with a great many fewer cars?

A. That is correct.

Q. Mr. Kline, in investigating the efficiency or the ability of the railroads to move this traffic, either in 1955 or 1964, there are a number of factors which have to be looked at to determine efficiency, in addition to the average capacity per car, are there not?

A. That is correct.

Q. And some of the factors that could be looked at are train speed between terminals?

[197] A. That is right.

Q. There are almost innumerable factors that could be looked at as some indicia of the efficiency?

A. That is correct.

Q. In trying to analyze the efficiency of equipment, would the ton miles per car or the ton miles per car mile be, in your opinion, particularly useful statistics?

A. It is a useful statistic. Yes. It doesn't take into consideration how long the car lays around, how long the shipper delays the car, how long the railroad retains the car.

Q. There are deficiencies in this type of statistic?

A. In every type.

Q. And in every type of statistic?

A. That is correct.

Q. Consequently, in order to have an overall view it would be wise to have statistics both of the ton mile type and of other types, such as turn-around time, and to look at them all?

A. That is right.

Q. From this, if we had sufficient expertise, we could probably draw some conclusions?

A. That is correct.

Q. Yesterday we discussed your general survey of statistics back to 1922 and your particular experience in the Commission [198] for now nearly more than two decades, since 1946. And I believe at that time you told me that there were, during that period, quite substantial shifts in traffic from some parts of the country to another.

A. That is correct.

Q. Could you generalize and tell me exactly where the

traffic is going and from where it is coming? In other words, what is the flow of traffic, from east to west or west to east?

A. I don't know.

Q. Is there more traffic now in the west than there used to be?

A. I don't know that.

Q. Is there more traffic in the east than there used to be?

A. I don't know that.

* * * * *

[211] Q. I believe we were discussing privately-owned cars and their consideration—the consideration of such cars in measuring the adequacy of the fleet.

Do you consider them part of the National car fleet?

A. They are.

Q. Should they be considered in determining whether or not that fleet is adequate?

A. They should.

* * * * *

[221] A. Aggregate capacity is essential—the essential factor, yes. Yes, sir.

Q. You say "increase in carrying capacity has been counteracted by decreases in ownership and in aggregate capacity," and we have pointed to aggregate capacity as "the essential factor." But there have been other counteracting factors in the industry, have there not, such as increases in efficiency, and that sort of thing?

A. Yes, indeed.

Q. As a matter of fact, there have been probably some factors which would tend to cause shortages in addition to the decline in aggregate capacity, isn't that so? In other words, there are factors that work both ways?

A. That is right, there are.

Q. None of these other factors have been taken into account here, have they?

A. No, they have not.

Q. Is there any way to determine whether or not they are important?

A. They are all important; there is no question about that. The information available was used, and there is other information probably which should have been used but was not available.

* * * * *

[237] . . . those cars as of 1926 in 1966, would you say

that you could have handled your all-time peak ton-mile load in 1966?

A. No, you could not.

Q. So in terms, then, of numbers of the cars per se, there is no significance in a statistical series of that kind?

A. None whatsoever.

Q. You have to make an analysis of what has been going on within that car fleet both in terms of the kind of cars involved, their capacities, and the corresponding changes that have been made in the railroad properties for handling that fleet?

A. That is right.

Q. Now, I want to shift the discussion a little.

The ability of that fleet to serve the public is also affected by the tariffs, as you have pointed out, in certain limitations. But is it not also affected by the rates and the minimum weights that go with those rates in measuring the demand for that fleet?

A. Surely.

* * * * *

[239] Q. (By Mr. Brooks) Increased weights and lower rates in covered hoppers with transit privileges thereto, for the purpose of getting grain to and from New England at reduced rates.

A. What was the question, now?

Q. Would that not affect the demand for boxcars in that class?

A. Oh, it would.

Q. So that this is the type of thing that is constantly going on in the rate structure, which would materially affect the evaluation as to the number of cars and the type of cars that will be required to provide an adequate car supply?

A. That is right.

Q. This evolution, again, is not reflected in any historical statistical series as to the number of cars or number of ton miles that may have been moved in those cars?

A. It is not. That is correct.

* * * * *

[247] Q. To some extent consistently, as you have pointed out, since 1916 regardless of the level of the freight car ownership there have been shortages and surpluses throughout that period?

A. That is right.

Q. And sometimes those shortages and surpluses were concurrent, because of the maldistribution of equipment?

A. That is right.

Q. Sometimes there were exceeded in some years, where car ownerships were high, sometimes they exceeded in some years when car ownership was low?

A. That is right.

Q. So you do not make a statistical correlation between the number of cars in the freight car fleet at a given time and the shortage at that particular time? You could not find [248] any statistical series that would give you a meaningful correlation?

A. I am not sure, I don't believe I know. I don't believe I could answer that.

Q. It would be a real coincidence if you could, with all the other factors that affect a question as to whether there is a car shortage?

A. That is right, yes.

Q. For example, in recent years no small part of the boxcar shortage has been occasioned by the determination of the Commodity Credit Corporation as to when and in what quantities it chooses to ship grain?

A. That is right.

Q. So, then, whether there is or is not a shortage is dependent wholly upon the determination of some Government officer in that group?

MR. BYBEE: Wait a minute. I don't think he accepted that conclusion. He said ——

EXAM. SWEENEY: He can reply.

THE WITNESS: The movement of CCC grain, should it occur during the harvest, will result in great shortages.

Q. (By Mr. Brooks) And it has, has it not?

A. It has indeed.

Q. And it has resulted in complaints to the Government about the determination to move CCC grain at those periods?

[249] A. It has, indeed.

Q. So again I say to you that that determination is wholly independent of the evidence of the statistical series as to the number of cars in the freight car ownership?

A. That is right.

Q. So in reality there is no correlation you could make

statistically that would be other than coincidence between the freight car shortages and freight car ownership?

A. I think you are right.

* * * * *

[254] Q. (By Mr. Moloney) Mr. Kline, in your opinion is 100 percent compliance with a code of car service rules possible?

A. No, sir.

Q. Do you think 100 percent compliance with a code of car service rules would lead to a more or less efficient railroad operation?

A. I think it would result in a less efficient operation.

Q. Then, in your opinion, Mr. Kline, is it desirable that there be a mandatory set of car service rules with sanctions attached?

A. I think it needs ——

* * * * *

[256] Q. (By Mr. Moloney) If rules are rewritten and sanctions were attached and then on the basis of your answer to the previous question that 100 percent compliance with the car service rules is impossible, would there not have to be considerable escape hatches in any scheme of sanctions?

A. Yes. There will have to be some escape hatches. But I think your mis-location of cars, dislocation of cars, can be solved; would be solved if your rules were rewritten.

Q. Do you believe it is possible, then, to write another set of car service rules to which 100 percent adherence could be accomplished?

A. No.

* * * * *

Q. (By Mr. Moloney) Mr. Kline, I am not sure of the exact [257] posture of the record with respect to car shortages. Perhaps this is more my fault than yours. We have had car shortages as reported in CS44 of the AAR.

A. Yes, sir.

Q. And we have had car shortages reported to the Commission in the accumulation of the statistics in Ex Parte 241?

A. That is correct.

Q. Now, I believe you testified yesterday, and possibly again today, that in your opinion the car shortages reported

in CS44 were inflated but that you did not know and had no way of knowing the degree of that inflation.

A. That is correct.

Q. Then I believe you testified today that the car shortages reported in the Ex Parte 241 statistics for the month of October 1964 were even higher than those reported in CS44?

A. That is correct. They were.

Q. For boxcars.

A. For boxcars, yes. That is what I thought you were talking about.

Q. Then am I safe in assuming that since in your opinion CS44 reports are inflated and since Ex Parte 241 reported shortages created the CS44 shortages, that the Ex Parte 241 shortages are themselves inflated?

A. I don't know. These were reports that were given to us by railroads. Whether they are inflated I don't know.

* * * * *

[295] Q. (By Mr. Macdonald) Mr. Kline, I want to read to you a question and answer in the transcript in Ex Parte 252, and I will show it to you afterwards. The question was asked of you, and I want to ask you whether this is the answer given by you. This is at page 274 of the transcript for the date of November 3, 1966, beginning on line 17.

"Q. (By Mr. Macdonald) Mr. Kline, I had asked you to state what your misgivings were about the questionnaire data used on Exhibit 187. I interrupted your answer, for which I apologize. Would you continue your answer? Answer: The shortages reported in October 1964 I think are overstated; how much, I don't know. I do think they are overstated."

Would you look at that and then answer my question whether that testimony was given by you in response to that question? [296] If you need to refer to the preceding portion or the following portion to refresh your recollection please do so.

A. I remember that.

Q. The answer is, then, yes, you did give that testimony?

A. Yes, I did. Yes, indeed.

Q. I have the same inquiry with respect to the testimony at page 474 of the transcript in that proceeding, which was given on the date of November 14, 1966, as follows, beginning on line 15.

"Q. (By Mr. Schmidt) In answering questions for other crossexaminers in this proceeding, Mr. Kline, you indicated that the reported shortages, in your opinion, are not—the reported shortages to the Commission as a result of their special study in October 1964 and the shortages reported to the AAR which you have in your exhibits, reported in your exhibits in this proceeding, are not accurate. Is that correct?

A. I said they were overstated, I believe.

Q. Could you tell me the basis for your answers that they were overstated, these shortages?

A. This is based on some of the investigations that our Bureau has made in the field. It is also based on the mathematical basis: if you say your railroad is 6,000 cars a day short this is 30,000 cars a week. If you are only loading 5,000 cars a week that is a little silly.

* * * * *

[302] Q. From what has gone into the record in the past two days it appears that you narrowly measured certain aspects of car supply, but without going into the economics, the conditions of the industry being served, or the industries being served, which produce the particular phenomenon about which you are reporting.

My question is: were you told to narrowly limit yourself to accumulating a box score of cars that were owned at different times in the past years, or were you asked to go further and produce some reasons why these figures are different at different times?

A. All I was told to do was to prepare some statements that showed the change in ownership by type of car in the past ten years. That is all.

* * * * *

[342] Q. I believe you have told other counsel that your exhibit material excludes the TOFC cars unless they are on longterm lease to the railroads.

A. And appear in the railroad's ownership, yes.

Q. You recognize, do you not, that there is a very large ownership in TOFC cars, and both bilevel and trilevel automobile rack cars, in Trailer-Train Company?

A. Yes.

Q. And that is a company that is owned by 39 companies, 38 of which are railroads?

A. Yes, sir.

Q. Is that information then, since those cars are used, and some of them under short-term or trip-lease arrangements, that should be used in measuring the car supply?

A. They should be.

Q. That information is readily available, is it not?

[343] A. I don't know where you would get it, no. The only place you could get it would be the Equipment Register.

Q. I would say just wondering whether the Equipment Register was readily available—

A. It is, indeed, yes, sir.

Q. Is there any reason that you decided to exclude that? Did you feel it was outside the scope of what you were asked to do?

A. I left out all private cars. This Commission has no authority over private car owners. They don't even have to tell us how many cars they own, if they don't want to.

Q. If it was determined the car supply problem was wholly due to shipper practices, do you think the Commission would seek to make the carriers buy additional cars rather than try to reach the shipper practices?

A. I don't know what the Commission will do.

MR. BYBEE: Objection. He can't testify what the Commission will do.

THE WITNESS: I don't know.

EXAM. SWEENEY: He says he doesn't know.

* * * * *

[348] Q. In determining the future need for plain boxcars, then, would some measurement be needed of the extent to which refrigerator cars in out-of-season movements or empty movements are used to move merchandise traffic?

A. That should be recognized, yes, sir.

Q. Do you know whether DF cars move to any great degree in assigned service?

A. I would not say assigned service. They move in controlled service.

Q. Service which is something less than under the principle of free interchange?

A. Yes, it is.

Q. Is that related to the fact that certain shippers find a great deal of need for that type of car because of the nature of the commodities they ship?

A. That is true.

Q. Is that reflected in reduced loss and damage?

A. It is, yes, sir.

Q. Summarizing on one point, so I can eliminate a series of questions which have already been covered pretty much, in what you have attempted to produce here, by reason of what you were asked to do, excluding what you were not asked to do, you have eliminated any consideration of the relative [349] economy to shippers of the use of one type of car as compared with another type of car for the same commodity and service?

A. I gave it no consideration, because I was not told to.

Q. And the same thing is true with respect to relative economy to carriers?

A. That is correct.

Q. The same is true with respect to the relative economy of carriers and shippers jointly considered in the sense of complete distribution cost?

A. Right.

Q. As a further point on that subject: Where there was utilization of a car which might be considered inefficient, but was due to a shipper-responsibility cause rather than a carrier-responsibility cause, you eliminated that from your consideration as a matter over which the Commission did not have jurisdiction?

A. No, because I had no knowledge of how much of those there were.

Q. I see. For example, in connection with utilization of boxcars, you do not reflect any examination into the difference in utilization of Class A, B or C boxcars?

A. No, sir.

Q. Would the difference in the class of boxcar have some relationship to, for example, how frequently it would be [350] moved in assigned service?

A. It would.

Q. How frequently it would turn around?

A. It would.

Q. Would the incidence of times in which shippers release boxcars, but with a lot of trash in them, either left over from dunnage, or because it is a good way to get rid of trash from the plant, would that affect the utilization of a car?

A. It most certainly would.

Q. Would a tariff penalty charge, for example, against

shippers to reduce that practice improve utilization, in your opinion?

A. It would, indeed.

Q. With respect to the reporting of information concerning Class 2 roads and switching companies, is that data excluded from any of your exhibits?

A. It is excluded from this, from any of my material, yes.

Q. Is that just because it was not available?

A. Because it was not available.

Q. It does not presuppose any predetermination as to any responsibility, or who should have responsibility, for the ownership of cars used by Class 2 roads and switching companies?

A. No, sir.

* * * * *

[1228] Q. That is true, is it not?

A. The Association would take care of it. If they did not accomplish it we would probably issue an order, yes.

Q. It is fair to say both those organizations, yours and the Association's, exist with that purpose largely in mind?

A. That is correct.

Q. Such a transition from areas of net surplus to areas of net shortage does take place ordinarily within a period of less than two weeks?

A. Yes.

Q. Under the normal administration of your activity?

A. Yes, sir.

Q. Where a situation such as I have described to you takes place, there is not in fact a nation-wide car shortage, there is simply a mis-location of cars in one area versus another, is that not correct?

A. That is right.

Q. And one of the purposes for including information concerning surplus cars in the questionnaire in this proceeding was to determine whether in fact there was a mis-location rather than a nation-wide shortage, isn't that true?

A. Among other things, yes.

Q. But that was an important consideration?

A. It was an important consideration, yes, sir.

* * * * *

[1230] Q. You discussed with Mr. MacDonald this morning the situation concerning 1967 surpluses and shortages.

Would you agree with me that as of mid-May the carriers collectively were reporting more than 16,500 cars surplus a day as against local shortages of only 2600 cars per day?

A. I don't know the figures. But I know it is big.

Q. And they are in that magnitude, sir?

A. Yes, they are.

Q. Roughly eight to one?

A. That is right.

Q. That is not a symptom of a shortage, is it?

A. Oh, no.

Q. This is a symptom of, if anything, perhaps it is mislocation, and if anything else probably an over-abundance of cars to meet stated shipper demands at the present time?

A. No, I would not say "over-abundance." I expect a lot of those cars, probably most of them, were stored on the various lines for harvest. Your railroad stores them, all of the railroads in the West store them.

Q. They would not be stored if a shipper had a need?

A. No.

* * * * *

[1235 & 1236] Q. In your experience, Mr. Kline, a person who lays upon a railroad an obligation to satisfy every order of a shipper for a car within 24 hours would be imposing a most unreasonable, if not arbitrary, requirement, would he not?

A. Very arbitrary.

Q. And very unreasonable?

A. Very unreasonable, that is correct.

Q. It would not only be unreasonable of fullfilment, it would be unprecedented?

A. It would be unprecedented, and you could not move the traffic if you had that many cars on your line. You would be plugged.

Q. That is in fact what is required by the questionnaire in Ex Parte 241, is it not, sir?

A. Pardon me?

Q. That is in fact what is required by the questionnaire in Ex Parte 241?

A. That is—

* * * * *

[1242] Q. (By Mr. Danielson) You have observed, however, that there was in fact a very substantially larger reported shortage on the 241 report forms than was in fact reported on the CS-44 reports, and you have testified to that effect, haven't you?

A. That is correct.

Q. Now, you are aware that the CS-44 report form which has now been copied into the record requires a railroad not to report as short a car which the shipper orders placed but does not desire to load. Is that correct?

A. Yes, that is right. That is right.

Q. Your form, that is to say, the Commission's form, issued to the railroad respondents in this proceeding required the railroads to report as short every car ordered by a shipper whether the shipper desired to load it or not; is that true?

A. That is right. That is right.

Q. So a paper order, a known false order, would be required by the railroads to be reported if in complying with the [1243] questionnaire they reported correctly under the instructions governing the questionnaire, is that correct?

A. That is right.

Q. So that is one reason, if reason there be, why the returns to questionnaire in this proceeding should very substantially exceed the shortages reported in CS-44 for the same proceedings, is it not?

A. I don't know.

Q. Wouldn't you expect that to be one of the reasons?

A. I would not expect it to be that much, no. I would not expect there to be that much difference.

Q. The types of orders which shippers place with the railroads—you have had experience in railroad train operations, in yards, in terminals——

A. That is right.

Q. — you know from time to time industries will place written orders for cars, and from time to time likewise industries will request orally over the telephone or through causing an employee to be sent to the railroad car dispatcher —will make oral requests for cars to be placed for loading?

A. That is right. That is right.

[1248] * * * * * *

MR. DANIELSON: No, this is the 241 instructions.

Q. (By Mr. Danielson) At pages 389 through 390, looking

at that transcript, sir, do you find that a railroad addressed the Commission with the suggestion, and I quote: "It is suggested that the final paragraph under this item be revised to read: 'Any types of cars ordered which are not available should not be shown as a shortage if other classes of cars are available and used.'"

Is that not what that says?

A. That is right.

Q. Does that not refer to the instructions in Section VII, Item A, which you discussed; and which we have just been reasoning together to say that if other cars suitable for loading are available it should not be shown as a shortage?

A. That is right. There is no shortage with the other cars available.

Q. What was the response given by the Commission staff to this question which we have just stated?

A. The answer is No, which was wrong.

Q. In fact, the Commission staff explicitly told the railroads "Where you load a covered hopper with 100 tons of corn and the shipper wanted two boxcars to haul the same 100 tons of corn you report it as one boxcar short," even though the shipper demand for transportation was satisfied and every reasonable [1249] expectation, every practice which had pervaded railroading up to this day had been satisfactorily accomplished, isn't that correct?

A. That is correct.

Q. It was just dead wrong?

A. It was wrong.

Q. It over-reported shortages?

A. That is right.

Q. Much more than CS-44 did, is that not true, sir?

A. Well, they were higher than CS-44, yes.

Q. Is that another reason the 241 shortages very substantially exceed the shortages reported in CS-44 for the fours weeks in question?

A. Probably.

* * * * *

[1254] Q. And I asked you there: "It would be grossly misleading as to the extent to which shortages occurred?"

And you answered: "That is right".

A. That is still my answer.

Q. That is still your answer?
A. That is right.

* * * * *

[1281] A. I would not know the percentage.
Q. You know, however, that a percentage of them are not loaded in compliance with car service rules?
A. It is inevitable that they will be.
Q. In other words, it is inevitable that you will not have 100 percent compliance with Car Service Rules 2 and 3?
A. Not when cars are tight, no, sir.
MR. MOLONEY: I think that is all.

* * * * *

[394] MR. BYBEE: Mr. Examiner, Mr. Gunderson is tendered for cross-examination.

EXAM. SWEENEY: I have one question in regard to the testimony that was just admitted into evidence, the second statement by Mr. Gunderson. Where does that leave us in relation to his Exhibits 1, 2, 3 and 4?

MR. BYBEE: I think as far as Exhibits 2 and 4 are concerned, the appendices to the supplementary statement are replacements. They supplant the first page of Exhibits 2—I beg your pardon. Let's go back.

As far as Exhibit 1 and 3 are concerned, the appendices to the supplementary statement supplant the first page of each of those exhibits. In other words, Appendix No. 1 to the supplementary statement is in lieu of Exhibit No. 1, page 1.

Appendix No. 2 of the supplementary statement is in lieu of page 1 of Exhibit No. 3.

EXAM. SWEENEY: It is your position, then, that the remainder of Exhibit 1 and Exhibit 3 has relevance, has some relevance here?

* * * * *

[395] MR. BYBEE: Mr. Examiner, I think that in view of the substantial revisions the application to the statistics for the individual road no longer has any relevance to Mr. Gunderson's testimony.

MR. STOKES: May we inquire of counsel whether this is being withdrawn?

EXAM. SWEENEY: Excuse me, Mr. Stokes.

Would the same be true as to Exhibits 2 and 4, Mr. Bybee? You may confer with Mr. Gunderson off the record, if you need to.

(Discussion off the record)

EXAM. SWEENEY: On the record.

MR. BYBEE: That is true, Mr. Examiner, the same comment I made with respect to Exhibits 1 and 3 would apply to Exhibits 2 and 4.

EXAM. SWEENEY: What is that comment, for clarification?

MR. BYBEE: My comment was that in view of the revision of the basic formulas contained in pages 1 of Exhibits 1 [396] and 3 the balance of those exhibits no longer has any relevance to Mr. Gunderson's testimony.

* * * * *

[787] Q. In your instructions to them did you ever instruct them to look for evidences of good car practices and good car utilization?

A. I did not instruct them to look for good practices, although they did develop some good practices.

Q. And those, of course, good practices, are found in their testimony, is that right?

A. That is not what we were looking for, sir.

Q. What were you looking for?

A. Practices that affect car utilization, car supply, and so forth.

Q. And practices affecting car utilization could be good practices or bad practices, am I right, sir?

A. Right. Right.

Q. And the good practices, which you say they did find, are reflected in their testimony, are they not?

A. No, I do not think they are.

Q. Would you know, Mr. Reider, why they are not in their testimony?

A. We figured you people would put it in.

Q. Do I take from your last answer your feeling, or the Bureau's feeling, that somehow this was an adversary proceeding where it was your duty to point out only the bad things the railroads were doing?

A. No, sir.

[788] MR. TROUSDALE: What was that answer?

(Record read.)

Q. (By Mr. Duerinck) Did you feel any responsibility in your position to bring forth on this record good practices of the rail carriers?

A. No, sir.

Q. You just felt the responsibility to bring forth the bad practices?

A. We did not feel that we had the responsibility of blowing the railroad's horn and telling how good their utilization was on unit coal trains and volume movements of this, that and the other thing, because it distorts the picture, in our opinion.

Q. But my question was, Mr. Reider: You did feel, how-

ever, that it was your responsibility and the Bureau's responsibility to put on this record the bad practices of the railroads?

A. Well, the bad practices we found, that is right; we felt we should put them in the record.

Q. On the bottom of page one of your statement, sir, and the top of page two, you speak about implementing original investigations. Does that simply refer to further communications with your field safety and service agents to do more elaborate investigations of things already reported?

A. Yes, sir.

* * * * *

[811] Q. Was that a normal type of direction or instruction to the regional directors at that time, in the investigation?

A. No, sir. This instruction was sent to these two directors due to the fact that our mens' activities were directed in other areas, other than the car service functions, and this was the reason we sort of prodded them a bit, for them to get out and get some additional checks on this Ex Parte 241.

Q. Because you needed a larger number from which to make your selection?

A. Well, we figured that the two areas, the area covered by the Chicago office and the Atlanta office, were very broad areas, and we felt that we should have more productivity out of those areas, than you would have say for example out in Denver, Colorado, or Salt Lake City.

Q. Do you know which of the reports are the "several good reports" referred to in this letter?

A. They are probably in our exhibits.

Q. And therefore, "good reports" would mean well-detailed reports of bad practices, would that be fair to say?

A. Well, well-detailed reports.

Q. And I thought we agreed a short while ago that the reports contained in the exhibit are reports of bad practices, did we not, sir?

A. I think you agreed to that. You said that.

[812] Q. Oh, you did not agree with me? I'm sorry, perhaps I misunderstood your testimony.

A. Maybe I did, sir.

Q. Do you, sir?

A. Generally, yes.

Q. So that "good reports" as used in this letter would mean well-investigated reports of bad practices?

MR. BYBEE: Objection. He has answered the question once.

EXAM. SWEENEY: I do not understand his answer. The objection is overruled.

THE WITNESS: I will say yes.

Q. (By Mr. Duerinck) I would like to go to another paragraph from this and ask you again if this is the normal type of directional letter that was sent at this period in the investigation.

"It is hoped that we might be able to get two to four reports covering such investigations from each agent in the section of car service."

Was that the normal type of direction to the regional director?

A. I would reply to that the same answer as I did before, that these two areas were, we will say, neglected.

* * * * *

[818] Q. How did you come to the number of 1700? Well, who selected the 1700 reports?

A. These were the reports that were submitted in connection with Ex Parte 241.

Q. They were specifically requested reports?

A. In a way, generally, yes, they were; specifically requested, or by general instruction.

Q. These, then, were reports specifically made for purposes of this investigation?

A. Yes, sir.

Q. They were not reports made in the ordinary course of the field staff's general duties during the course of a year?

A. Oh, yes. They were made. But you do not make an investigation without a basis for the investigation. In other words, we put out an instruction that here is an Ex Parte 241 proceedings—

Q. "Go get some reports"?

A. Yes, anything you find, you would file it under Ex Parte 241.

* * * * *

[1402] Q. And if you needed to do that today you could follow the same procedure, could you not?

A. We could. But the car situation today is entirely different from when we issued those orders.

Q. Is it easier today?

A. Much easier.

Q. Do you think it is easy enough today to where you would not issue such a car service order? You would not put one out today?

A. I don't think it is necessary. I don't know who would accept the cars.

Q. I am talking about a car service order that prohibits a railroad from accepting from a shipper a car loaded—not loaded in compliance with Car Service Rules 2 and 3. Are we talking about the same thing?

A. Oh, yes.

Q. You say you do not consider the car situation today serious enough to warrant the Commission putting out such a car service order, right?

A. I don't think so.

* * * * *

[1418] Q. The language of Note (C) refers first to the granting of exceptions by the Car Service Division of the Association of American Railroads and then says "Requests for exceptions must be in writing and must contain a full statement of the need for the exceptions."

I was inquiring as to whether that provision applied to the request made to the Car Service Division of the Association of American Railroads.

A. I do not think we had that in mind. I think we had in mind that the request to the Commission would be in writing.

Q. So the request could be made orally to the Car Service Division of the Association of American Railroads?

A. That is right. And they would support the request with a statement to the Commission.

* * * * *

[1419] Q. Was it intended that when a request for exception had been received by the Car Service Division of the Association of American Railroads and had been approved by that Division that the request must then be submitted to the Commission for its approval?

A. Yes, sir.

* * * * *

[1473] Q. Now, on what basis was it decided that it was desirable to have a heavy loading period rather than a normal loading period?

A. October is historically the heaviest loading period of the year, and that was the reason the decision was made to take October.

Q. I am aware October is the heaviest loading period. My question, sir, is directed towards why was it decided that a heavy loading period was more desirable than a normal or average loading period.

A. We thought it would be more representative.

Q. Pardon me?

A. We thought it would be more representative.

Q. It is your position that it is more representative to use a peak period rather than an average period?

A. I think that was the decision at the time, that they would use the heavy loading period, not necessarily the peak, but—

Q. I know that was their decision, sir. I am trying to find out why.

A. That I cannot answer.

Q. You were present at the meetings?

A. Yes, sir.

Q. Would you be able to refresh your recollection from any documents or memoranda of any of those meetings?

A. No, sir.

[1474] MR. BYBEE: I object to further questioning along this line. This is beyond the scope of his direct testimony.

MR. WALTON: Mr. Examiner, he adopted the testimony of Mr. Kline and Mr. Robinson; and one of the most important issues here is: why was October chosen? Why was the known peak period chosen for this supposedly representative test?

EXAM. SWEENEY: There is no question pending.

Q. (By Mr. Stokes) Was it your understanding, Mr. Reider, that the intention of the statistics was to measure the obligation of the carriers in regard to peak periods?

A. It was not my intention. But based on the period selected it would indicate that this possibly is what they have in mind.

Q. This is what I am trying to find out, Mr. Reider. You say this was not your intention?

A. It never has been my intention that a carrier should own sufficient equipment to take care of all these peak, emergency and unprecedented movements. I have never been of that opinion.

* * * * * *

[1528] Q. As a matter of fact, there are no substantial shortages at the present time, are there?

A. There are no spectacular shortages.

Q. Are there any service orders outstanding?

A. Yes.

* * * * *

A. Service Order 975, that is an operating—

Q. I know there are some general service orders outstanding, and have been for sometime.

There is a demurrage order outstanding?

A. That is right.

Q. That has not expired?

A. No.

Q. That was put in effect when cars were considerably tighter than they are now?

A. That is right.

Q. It is possible for the Commission to suspend effectiveness of that at any time?

A. That is right.

* * * * *

[1557] A. You are talking of Car Service Rule 1? Car Service Rule 1 prohibits you from moving cars off-line if you have suitable other cars available.

Q. There may be rules that do, but there is nothing physically about the cars, they are serviceable cars.

A. If they are mechanically okay, yes.

Q. It is your view management is derelict, I gather, and it is your view that these rules and proposals are generally designed to prohibit that sort of thing, and prevent it, and to do something about it, isn't that right?

A. In part, yes.

Q. And the general principal involved, as I understand your testimony and the brief testimony of Mr. Robinson, that has been given, is that these rules are, shall we say, quite strict and that you might reasonably expect a number of continuing violations of these rules but that the rules simply would not be enforced that strictly, in other words,

there would be understanding enforcement of them, and that is why they are drawn so strictly?

MR. BYBEE: Did you get all that question?

THE WITNESS: Yes. I didn't think he was through.

MR. WALTON: I am through.

Is that generally the thrust of it?

THE WITNESS: Yes, I would say so.

Q. (By Mr. Walton) For instance, then if a road occasionally [1558] violated Car Service Rule 1 and the service agent found it, there is not going to be a big deal made out of this, no prosecution of that railroad, so long as your department believes that there has been good faith attempt to comply with the rule.

Is that correct?

A. It has been that way over the years, and so long as I am here it is going to be that way.

Q. In fact, with a rule like Rule 1 there are almost certain to be violations?

A. There very definitely are.

Q. Even were the rule made mandatory and everybody tried very hard and spent a great deal of money trying to comply, there would still be violations?

A. I think there would be less tendency to violate if they —if this became mandatory, because many carriers we find now during adequate periods of car supply will load and force their cars offline to get them out on per diem and get the foreign cars out of their hair.

Q. I understand all the problems. And I certainly agree with you if the rules were made mandatory there might well be less violations. That is one of the reasons that we have penalties for crimes, and laws on the books, isn't that right? And isn't that really what you are proposing here?

A. Yes.

Q. But this particular law is not the kind of law that we draw [1559] to prevent murder. This is the kind of law we drew to prevent drunkenness in public. And your enforcement of it would be the same as a law for drunkenness, that is, if the railroad were not too noisy and you had not arrested him four times before for drunkenness, you would not under those circumstances prosecute him?

A. Mr. Walton, although some people may accuse us of not being too understanding, I think we are pretty under-

standing here. And I do not know of a case that has ever been prosecuted that a railroad has not been warned well in advance. There may be some that could involve a violation of a same thing at another location, that we would not go in and warn them in advance. But usually we go on record with the railroads, calling these violations to their attention, giving them a chance to straighten things out. I think this would hold true in most of the cases referred to the Commission. But don't get me involved in that drunken one.

Q. Right. And the answer to my question then, is "yes". You are here suggesting very harsh rules to be applied mildly by a friendly policeman, isn't that the idea?

A. We are proposing rules not to be applied mildly but to be applied by friendly policemen, I will agree with you there.

Q. Right. But you would recognize there will inevitably be violations of Rule 1, say, on every railroad?

A. That is right.

* * * * *

[1561] Q. Your proposal—under your proposal, what is the penalty for violation, presuming that you did run into this situation?

A. We have no provisions that I recall in here for any penalty.

Q. Did you realize, Mr. Reider, when you made this requirement to be incorporated in the tariff, that there is a penalty in the statute?

A. I know it, yes.

Q. You must—you know what that penalty is, don't you?

A. Yes.

Q. What is that penalty?

A. I think for civil violations it is $100 to $500, and probably for the criminal, whatever it is, it goes up, under the Elkins Act, it goes up from 1,000 to 20,000 dollars per count.

Q. So the minimum is $100, however?

A. Yes.

So if you found a railroad particularly flagrantly violating these rules you could go out and really make them toe the line, couldn't you?

A. We could try. But the small penalty here is nothing more [1562] than a license fee.

Q. Well, that is, of course, per car?

A. That is right—per count.

Q. Well——

A. Each car is a count, yes.

Q. That was my understanding.

A. Yes.

Q. But even the best of railroads you could catch for a number of counts.

A. I think if you checked on any particular railroad and if you concentrated your men on any particular railroad you could catch them for a number of counts, that is right.

Q. We had some discussion about compliance with the order that the AAR issued this winter, the early part of this year, applying to the Great Northern and Northern Pacific. What was that number again?

A. I think it was Special Car Order 112.

Q. Do you have any idea of the percentage of compliance with that order?

A. We weren't interested in the percentage of compliance. We were interested in seeing the cars got back to the beneficiary roads. We did not check the percentage of compliance with the order.

Q. Would you think 80 percent would be good compliance with that order?

[1563] A. I think it would be excellent compliance.

Q. From your tone of voice I gather it would be a little more than you would expect, too.

A. I think so, yes.

Q. If the Commission had issued that same order would you think 80 percent would be excellent compliance then, also?

A. I think so.

Q. Would you think that would be about as much as you would find even if the railroads were trying pretty hard to comply with it, when you sent your field agents out, if you did?

A. I—

Q. I am talking now about a Commission order.

A. I would say if we found that the compliance was that good—now, 20 percent non-compliance could represent a teriffic number of cars.

Q. That is always the case.

A. That is right. But you are talking of 80 percent, now?

Q. Yes.

A. I would think if we found 20 percent non-compliance we possibly would write to the carriers calling their attention to this. It is pretty hard, you see, to pin this down to 80 percent compliance on a car distribution direction. That is pretty hard to pin down. If you have a service order, like we have in operating regulations, a service order, then you would go in, and 80 percent compliance in the placement of cars— [1564] if you involve a large number of cars—that could be very serious and possibly there again we would write the carrier, and if recheck developed that 20 percent non-compliance still existed after the letter and after the first check, it is possible we would refer it to the Bureau of Enforcement for prosecution.

Q. I want to warn you, I am a little vague sometimes on railroading, and what is very clear to you sometimes is not so clear to me.

You were speaking, in the answer to that question, of a comparison between an order of this sort, which I understand to be an exclusion order—

A. That is right.

Q. —you were comparing that with an order requiring some method of placing cars?

A. Operating regulations.

Q. An operating regulation?

A. That is right.

Q. Now, an exclusion order actually is quite similar to the model you are proposing in Car Service Rules 1, 2, 3, and 4, is it not?

A. Yes, that is right.

Q. So, we would say there 80 percent compliance you would consider pretty good?

A. If we got compliance with Rules 1, 2, 3, and 4, we would not have to worry about car distribution directions, or service [1565] orders covering car distribution.

Q. I am asking whether 80 percent compliance would be pretty good with 1, 2, 3, and 4?

A. In my opinion, it would.

* * * * *

[1570] On the other hand, I think we were discussing Rule 1, and I think we established there that you thought some

lower level of compliance would be reasonable, and about as much as could be expected, because it is a rule that is harder to comply with.

I am asking you whether or not there is not a varying degree of compliance that could be expected with respect to each of the rules, and it might range 100 percent for some of the rules down to a lower figure than with Rule 1, even?

A. 100 percent non-compliance?

Q. No, 100 percent compliance.

A. I agree, right.

Q. So with some of the rules we might obtain 100 percent compliance, possibly, and with other rules—

A. That is right.

Q. —and with other rules we might reasonably find compliance only of 80 percent, or perhaps even lower? Because I think we established 80 percent for Rule 1.

A. I think we would be satisfied with 80 percent.

Q. Right. On Rule 1?

A. That is right.

[1571] Q. It is possible some of the rules might turn out in practice to be so hard to comply with that possibly reasonable compliance would be less than 80 percent?

A. I think if we get below 80 percent we have a bad rule.

Q. Well, that is possible, is it not? These rules have not been put into practice, have they?

A. They have not.

Q. No one has ever tested them in practice, or a lot of them?

A. Substantially a lot of them have been tested, because a lot of them are rules of the AAR.

Q. But they have not been tested mandatorily?

A. No.

Q. And field agents have not been out checking them?

A. To a degree, yes.

Q. On a lot of them, you don't know the extent to which they are complied with?

A. That is right.

Q. And so there might be bad rules in the lot?

A. That is right.

Q. And practical experience would show that?

A. It could.

Q. As a matter of fact, all you are telling me is if the compliance ran below 80 percent generally and you still felt the

railroads were trying hard to comply the fault would lie in that case, probably with the rule, and not with the railroad, isn't [1572] that it?

A. If that would be the case, I think the rule should be revised, if we find that—I don't think that these proposals are ironclad, nor do I think they are the best we can come up with, because, after all, we are a small group here, trying to use our best judgment on those things. And I do think that since we were instructed to cooperate with the Association of American Rialroads, they in turn were instructed to cooperate with us, we tried to take advantage of their know-how and get some of this information in here, though they had nothing whatsoever to do with the rules we have proposed.

Q. You are not suggesting the Association of American Railroads concurs in these rules, are you?

A. No, sir.

Q. I did not get a flat yes or no answer to that question, and I am going to repeat it.

I think you agree with me that if compliance with one of these rules as a general matter drops below 80 percent and if your group is convinced that there is a general good faith attempt to comply with the rule, under those circumstances it would be the fault of the rule and not of the railroad, in all probability?

A. It could be, yes, sir. It could be.

Q. You would not deny, would you, that that could occur with these rules?

[1573] A. I would not deny it, no, sir.

Q. But in theory at least, while that rule was in effect each failure to comply with it would subject the railroad to a $100 fine, would it not?

A. It could, yes.

Q. Indeed, the penalty could exceed $100, couldn't it?

A. Yes, sir.

* * * * *

[1662] A. I used that "geographical" term here in a general way, i.e., East, Southeast, Northwest, Southwest, and the Pacific Coast, for example.

Q. Right. But you didn't intend to imply that you made some effort to scientifically sample all of the geographical areas of the country in order to get a certain proper percentage of the samplings of the car loadings and prac-

tices in Official Territory as opposed to a proportional number from all of the East and a proportional number in the Southwest, did you?

A. No.

Q. You are just trying to say that some of these practices occurred in a number of areas of the country, while others occurred perhaps not in all areas; isn't that the idea?

A. Well, that is right. You would find that in a sparsely located area you wouldn't find a lot of practices you would find in a heavily industrial or heavily populated area.

Q. Obviously some of the practices indicated here would be more likely to occur in a terminating area than in an originating area, and vice versa?

A. That is right.

Q. And you did not make any effort to weight out the areas in proportion to the type of practice that was occurring?

[1663] A. I don't think so.

Q. That method of selection just was not used, was it?

A. I don't think so.

Q. That method of selection to which I was referring is usually called "random sampling," or something like that, is it not?

A. I think so.

Q. And you did not use that?

A. No, sir.

* * * * *

[1674] Q. (By Mr. Walton) How many of these reports, however many there might be, were made, if I may quote your instructions "to strengthen the case" in Ex Parte 241?

A. I don't know the exact figure. But the 1700 figure I used was the reports that Mr. Robinson with the assistance of Mr. Cox reviewed and picked out the ones that were what we thought were good 241 reports.

* * * * *

[1675] Q. This statement on the last page of these instructions that they are going to make certain reports—do you see the phrase I refer to, on the 7th line in the last paragraph—and that these reports are "to strengthen the case," those are the 241 reports, right?

A. Yes, sir.

[1683] Q. In reveiwing the testimony of Mr. Kline and Mr. Robinson, is there anything in those statements which would enable you to say with even some reasonable degree of certainty, that a [1684] particular individual railroad in the country was deficient in car ownership?

A. I don't think there is anything in either statement.

Q. Have you ever seen anything in industry, in anybody else's testimony in this proceeding, or anywhere else, that would enable you to say that?

A. I have seen some of the testimony that indicates some need for some carriers—indicates some carriers are deficient ownership.

Q. That would be Mr. Gunderson's testimony?

A. Yes.

Q. But you recognize, do you not, that Mr. Gunderson has withdrawn those individual applications of his formulae?

A. Oh, yes.

MR. BYBEE: Objection, Mr. Examiner. I don't think he ought to ask Mr. Reider about Mr. Gunderson's exhibits.

MR. WALTON: I think that is a fair question. He brought it up.

EXAM. SWEENEY: Yes. I think he can go this far.

MR. WALTON: I do not intend to cross-examine him on it.

EXAM. SWEENEY: The objection is overruled.

Q. (By Mr. Walton) You recognize Mr. Gunderson has withdrawn those individual applications of his formulas, because he has changed his formulas?

A. I so understand.

[1685] Q. Therefore, would you rely on those withdrawn exhibits in making such determination?

A. No.

Q. Then, have you ever seen anything anywhere that would enable you to make a determination as to whether an individual railroad was deficient in car ownership?

A. No, sir.

Q. Is there anything that would enable you to say that a railroad that had a severe shortage was less deficient in ownership, then, than a railroad that had a surplus of cars?

A. No, sir.

Q. In other words, there just is not any basis upon which you can compare one railroad with another as to the deficiency or adequacy of its car ownership, as far as you know?

A. Not in this study as far as we are concerned, no.
Q. As far as your section is concerned?
A. That is right.

* * * * *

CHARLES C. ROBINSON
(Interstate Commerce Commission)

[938] Q. Is there any evidence in your statement or exhibits which describes the basis upon which these field agents acted to produce this particular number of reports in the sense of what was excluded and the basis for either?

A. No, sir.

Q. These reports were all produced not in the course of business but especially for this investigation, were they not?

A. I would say predominantly, although they do on occasion make such reports in connection with routine duties.

* * * * *

[960] Q. If you will reacquaint yourself with the text where you begin to speak of Exhibit 27, are you there comparing the average boxcar shortage for January 1965 through March 1966 with the percentage of boxcars owned on owner's lines, which I believe you set forth on page 61?

A. Let me see here.

Yes, with the proviso that it is read in context with the information contained in Exhibit 27. This is merely a continuation of that exhibit.

Q. Yes.

A. It was prepared after the exhibit was completed.

Q. What is the correlation between those two factors, the reported so-called average boxcar shortage, and the percentage of boxcars owned on owner's lines, if any?

A. There is a tendency for the percentage of home cars on home roads to decrease when boxcar shortages increase.

Q. To take an extreme example, all of the owner's cars could be off line and there be no shortage, assuming that that railroad had sufficient foreign cars for its loadings, isn't that so?

A. Yes, this could happen.

[961] Q. So a correct factor to correlate shortage with would not be the cars on owner's line, but the cars available for loading, isn't that correct, whether they are owner's cars or foreign cars?

A. Not necessarily. The cars available for loading may represent an unequal distribution because of previous loading patterns.

Q. That answer is perfect. It is absolutely meaningless to me.

A. I understand, Mr. Macdonald. I am not sure it is very meaningful to me, either.

Q. Do you want to try again?

A. What I am trying to say is that Railroad A, being a heavy terminating line but not exclusively a terminating line, may have substantial loaded car movements available between points on its line. We will say that the railroad runs from west to east, and has no connections on the east end of the line, but at some mid point it has additional loadings for eastbound movement. Now, it may receive substantial numbers of cars from the west end of its line from other railroads, receive them under load for unloading at the east end of its line. Now, if the local demand on Railroad A should increase sharply it might well be able to retain the cars which it receives on the east end of its line to protect those particular local loadings, and encounter little or no car shortage.

[962] Q. Are you stating a circumstance under which your comparison might be valid, and suggesting that that was the circumstance you were describing in this testimony?

A. What I am really trying to say, Mr. Macdonald, is that periods of general car shortage tend to increase the percentage of system cars away from home, for the reason that the line which has possession of the car when it becomes empty, or which gains possession of it after it becomes empty, may well tend to keep it rather than to return it to the owner.

Q. I believe you do agree with me that while this may be true, that the ratio of the cars on line which are home cars may drop, this has no necessary correlative with the number of cars short, nor the total cars on line, because you have the question of the number of foreign cars coming on line absolutely open, isn't that true?

Let me restate it. I see you hesitate.

Even if it is true that out of say 150,000 cars on line on a particular railroad, assuming that number continues, the number of home cars may drop for the reason you are talking about, this doesn't carry with it as a necessary consequence that the total number of cars is going to drop, but there you have to measure the availability of the number of foreign cars coming on line, don't you?

A. Yes. It would depend on the location of the railroad.

Q. So it would be improper, as I originally suggested, to [963] compare, as I believe you have done here, the percentage of boxcars owned on the owner's line with the car shortage, or to use it as a correlative, one for the other?

A. I think it is the other way round; the car shortage tends to cause mislocation of the cars, although mislocation of cars may cause a car shortage on a particular line. But as a national average I don't think mislocation of cars is a cause of car shortage.

Q. Are you adding something to your testimony? I did not believe you were talking about it on that basis here.

A. The basis on which I was talking actually was to demonstrate a need for more effective return of cars to the owner lines.

Q. Why is it any more valid to assume that because a railroad has a drop in its ownership on line that there is a shortage nationally than it is to assume that that railroad has insufficient ownership on an individual basis?

A. I did not assume that. The assumption is the other way around, that if there is a national shortage there will tend to be a dislocation of home cars.

Q. But you cannot reason it the other way around?

A. No, sir.

* * * * *

[979] Q. Apparently you recognize the responsibility for car supply should be on the origin carrier, provided the Car Service [980] Rules permit him to exercise it, is that correct?

A. That is correct.

Q. And what is your reasoning in support of this proposition?

A. I think I have pretty well stated it. I will state it again, though.

The basic knowledge and familiarity with the shipper's needs is not likely to be very widely dispersed. It is true that any given car may handle several different commodities, but it is not necessarily true that it handles each of these different commodities with equal success. Now, I am not indicating that the origin carrier does not also have the problem of compromise between numerous commodity requirements and some reasonable type of car that can be used for more than one thing. But it is easier for the

origin carrier to make such compromises under his comparatively limited group of shippers than it is for him to know what happens—to know the demands one thousand or two thousand miles away from him.

* * * * *

[1009] Q. All right. Perhaps you would then get back to one of the basic factors in the use of this principle, which is to give the car-owning carrier more control over the use of his equipment, for any of a number of reasons, including the fact that he knows better what the shipper requirements are on his line, for whom he originates traffic, and possibly also reasons of equity, that he has bought the car and therefore he should have more control over its use to prevent it being appropriated and used by other railroads?

A. That is one of the main purposes of the proposed car service rules, to give the car owner greater control over the use of his own cars.

Q. When you say "car service rules", of course, you are talking about the cars moving in free interchange?

A. Yes.

Q. In other words, when cars move in free interchange car service rules are much more necessary in order to give the owner an equitable share of the use of the car than in the case of specialized cars or assigned cars where the restricted interchange principle applies which, by definition, gives the owner control over the use of the car?

A. Cars moving in free interchange, to be effectively controlled, [1010] require the use of such rules as existing and proposed car service rules 2 and 3.

Q. And likewise cars moving under the restricted pattern of interchange, such as assigned cars, covered hoppers moving under special instructions to return empty to the owner's line, and other cars moving in similar controlled services do not need the use of the car service rules, because the owner does have control over them?

A. They do not need car service rules 2 and 3 and the proposed rules exempt such cars from those rules.

Q. Do they need car service rule 1?

A. Not particularly.

[1011] Q. At the present time is it within the discretion of the owning railroads to determine pretty largely what cars they own are to be in the group which moves under

free interchange as compared with those which move under some sort of ownership control of interchange?

A. Under the present rules of the Association of American Railroads there are somewhat conflicting regulations. Circular CSD 145, I believe the current one is "U" provides for the return of cars of certain types to the owning lines. It applies basically to equipped boxcars, to some special types of flatcars, special types of gondolas, and special types of refrigerated cars. And it provides for automatic return of such cars if in assigned service to the agent at the origin where last loaded, and if in unassigned service it requires that they be handled per owner's instructions, or returned empty or loaded to the owner.

There is also a circular containing similar instructions, which relates specifically to covered hopper cars.

Q. Your illustration earlier was of a railroad loading, say, grain, and buying covered hoppers because the shippers that that railroad serves want covered hoppers, whereas the connecting line loads grain in boxcars because its shippers want boxcars for that loading, thereby reducing if not eliminating the interchangeability of that equipment.

The railroad which buys the covered hopper cars instead of [1012] a replacement boxcar, or a boxcar, or two boxcars would likely be the parallel, is in effect taking two cars out of the free interchange fleet and putting them into the fleet of cars that move under restricted interchange principles, is it not?

A. I suppose so, yes.

Q. And that is the trend that we have been talking about this morning which has been going on in the industry as more and more of the carrying capacity of the industry comes into the category of special equipment which is continued under the owner's control even when off line, is that true?

A. Yes.

Q. Now, we are therefore faced in this proceeding, are we not, with reconciling at some point the degree to which this trend should be recognized and approved and the point beyond which we should say there is being reduced past the irreducible minimum the number of cars or the carrying capacity which should be maintained in the free interchange car fleet? Do you recognize that this is the basic issue that we are dealing with here?

A. I don't think we have advanced any proposals that

would prevent any carrier from deciding that it wanted to buy any number of covered hopper cars and in its own thinking offset that by a reduction in the number of boxcars, for example, which it might otherwise buy.

Q. Then—

[1013] A. That privilege exists for any carrier at the present time and I do not think there is anything in my proposals that would change that.

Q. Well, if there is, or if it should be decided by the Examiner or the Commission as this case progresses that any of your proposals would have the effect of creating an economic bar to the continuation of this process through which by specialization of equipment to meet shipper's needs, in part at least, the industry is switching to the restricted pattern of car interchange and reducing the cars in the free interchange fleet, then you would not want your testimony or your evidence to be construed as creating such an economic bar or regulatory bar?

A. I think my evidence and testimony tends to reemphasize the car owner's rights to the control of the equipment it purchases.

Q. I recognize that.

A. With one other proviso, that it gives to the origin carrier rights which the present rules do not give—not rights, but incentives, which the present rules and practices do not give, to reject for originating traffic of cars owned by other carriers.

Q. It would not do the originating carrier much good, would it, if the cars it received in interchange service in exchange for the cars it delivers in interchange service were of a type which the originating carrier could not use to meet the needs [1014] of its shippers?

A. No. The originating carrier always has this problem.

Q. So that if we assume, for purposes of simplification, that we give this increased right to the originating carrier, but the carriers buy completely different types of equipment, then we are dealing in a futility, so far as using regulatory means to enforce greater utilization of cars, because they all become specialized cars and are no longer subject to the Car Service Rules which you propose?

A. It may be that at some future date the conditions you describe will exist. They do not exist at the present time.

Q. Would you consider the elimination of Car Service

Rule 1 as having any bearing on whether or not they will continue to exist or be different in the future?

A. I think Car Service Rule 1, if it were enforceable and endorsed would have a stronger influence on the decision of any particular management to buy or not to buy a group of cars for use in general service. I do not think it would have any bearing on their decision to buy cars to be used in any form of controlled service.

* * * * *

[1904] Q. (By Mr. Maddox) Do you agree with Mr. Reider that the Commission would not expect more than approximately 80 percent compliance with these rules?

A. I could not say what percent compliance the Commission would consider reasonable.

Q. Do you consider yourself, personally, that 80 percent compliance would be reasonable and all that could be expected?

A. I would expect with the hopper cars covered by C-411, and some other hopper car orders that have not been mentioned, that virtually 100 percent compliance would be reasonable. With other types of cars I suspect a somewhat lower percentage would be reasonable.

Q. In your opinion a staff of about how many men would be required to police these rules throughout the United States?

A. That is a decision the management of the Commission would make. I have no opinion on the subject.

* * * * *

[1958] Q. (By Mr. Moloney) Mr. Robinson, could we refer to Note (C) to your Car Service Rules 1, 2, and 3?

A. Yes, sir.

Q. Would you please explain exactly how you intended to have a provision work?

A. Mr. Moloney, if a railroad, or railroads, had a desire to be relieved of any of the provisions of Proposed Car Service Rules 1, 2, 3, or 4—

[1959] Q. This doesn't apply to 4, now.

A. I beg your pardon. 1, 2, and 3, you are correct.

—they would approach the Car Service Division of the Association, stating their case, and the car Service Division, at its discretion, would submit such a request for an ex-

ception in writing, to the Commission, with a statement of the needs and the justification.

Subsequently the Commission would grant or deny in whole or in part the requested exception.

Q. Is if your thought that the exception would be of a personal nature, where a railroad felt that Car Service Rules 1, 2, and 3, let us say, should not be applied, should not apply to a given situation on their railroad, which given situation would be a continuous situation?

A. I would think that some such request would be made, and that that sort of request would be handled as a formal—well, that is not quite the right word—that a permanent exception to the rule would then be so published, but requests for an exception designed to meet, oh, an emergency condition of some sort would be handled through a service order or a permanent system of some sort.

* * * * *

[2070] Q. I would like to go briefly to another subject having to do with Exhibits 27 and 28, in which you show percentage of home cars on line and draw certain conclusions from that. My questions relate to the formula relationship of that evidence.

Where you show, for example, that railroads in particular regions or individually have a drop in the percentage of home cars on line, is there more than one explanation for that phenomenon?

A. I would say there are at least two, and perhaps more.

Q. Which ones occur to you?

A. Well, in a period of light traffic, generally light traffic, the urge to escape per diem payments will result in the return of freight cars to the owners, and at the same time the lack of available traffic may prevent the owner from loading the cars off line, even assuming that he wishes to completely disregard Car Service Rule 1.

Secondly, at any period of time, regardless of general business conditions, the extent to which a car owner is willing to disregard the provisions of Car Service Rule 1 will have a bearing on the ratio of his own cars to his ownership being located on his own line.

* * * * *

[2071] Q. Looking at it in times of car shortage, I believe

you draw the conclusion that when the percentage of home cars on line drops that indicates a car shortage.

Do I correctly read you in your testimony?

A. I think they occur together, but I am not so sure I would decide which was the—

Q. There is no statistical correlation, it is simply a parallel set of circumstances which you suggest?

A. Yes. And I think they are almost inevitably related one to the other, but I am not sure which is cause and which is effect.

* * * * *

[2075] A. The ratio of total cars on line to cars owned has nothing to do with appropriation of system cars, although that might be a factor that changes that ratio. Certainly the ratio of cars on line is not in and of itself an index of ownership responsibilities.

Q. You are again back to system cars. I carefully avoided that in my question, which is simply this: Railroad A has on line at a particular time and as an ordinary matter, according to a memorandum which the Commission wrote to Senator Magnuson, in the Great Belt area 85 percent of its ownership on line. That means cars of all ownerships on line equal to 85 percent of that railroad's ownership of this particular kind of car. That ownership drops at a particular time to 65 percent.

Let us assume under the originations formula that railroad owns only half as many boxcars or other grain-capable cars as that ownership formula would require it to own. In such a circumstance is it not perfectly evident that the decline from 85 percent to 65 percent may be due in whole or in part to the efficiency in ownership for that railroad just as much as to a conclusion that other railroads have misappropriated cars either in violation of car service rules or through use of the [2076] flexible provisions of the car service rules?

A. The decline in the ratio of cars on line to ownership would be the result of cars leaving the line, probably under load, in excess of the numbers that are received. It has no particular bearing on ownership adequacy or inadequacy.

* * * * *

[2179] Q. In your Exhibits 19 to 23, relating to so-called tramp cars, controlled but not in assigned service, it ap-

pears that you studied some six locations. How were these locations selected? Or do they purport to be representative of practices throughout the country?

A. There wasn't any particular method of selection used. They were reports of conditions found by the field agents from checks made at this time of six, maybe ten, different stations.

Q. So the showing in this exhibit is not necessarily representative of all regions?

A. It is representative of a condition that could be found without much difficulty in any region. I would not say it is "typical," that is, that you will find it at any and every station, because you certainly won't.

Q. As far as your conclusion is concerned you are saying that what has occurred at these six locations can be found in any region throughout the country?

A. Yes.

Q. How were the cars that were studied selected?

[2180] A. In the instance of Exhibit 22, it was the by-product of an assigned car study in which the entire car-loading performance of a shipper, assigned cars, unassigned cars, and controlled cars, was studied for a month. In others it was more or less chance, something the field representative picked up on a periodic visit to a particular station.

Q. Then there was no prescribed scientific sampling procedure?

A. No.

Q. And there wasn't necessarily any uniformity as between the studies of the various agents?

A. No.

Q. And that is fairly well characteristic, is it not, of all of these studies reflected in your exhibits?

A. I think the assigned car studies have a fairly uniform pattern, but the others don't.

* * * * * *

[2228] Q. But not to give the Commission or the Examiner a full view so he could determine and the Commission could determine whether these examples of 1/100 of 1 percent, 1/10 of 1 percent, 1 percent, or 10 percent, of all movements covering special service freight cars, is that right?

A. We would be unable to do that within our capacities.

Q. Do you know that your Bureau would not be able to do that, would not have the power to direct the carriers to give information which would furnish the basis for a representative study?

A. For the kind of study to which you have reference, we have neither the staff nor the time.

* * * * *

Q. (By Mr. Schmidt) Do you consider, then, that in view of the limited staff and time you profess to have at your disposal that it is proper in view of the Commission's order to just gather facts that are detrimental to the carrier's position in this case?

A. We think we have made a proper presentation, the way we see it.

* * * * *

[2287] Q. (By Mr. Walton) Actually, Mr. Robinson, you do have sufficient experience with the railroads to exercise some sort of judgment as to the costs of these proposals and rules, do you not?

A. Oh, I think some of them would have some costs attached and I think others would not. I don't think I would care to express any judgment, without specific study of a particular phase and for a particular railroad.

Q. That was an excellent explanation.

MR. WALTON: Could the question be read? so that we also get an answer to the question.

(Question read)

THE WITNESS: I could do it.

Q. (By Mr. Walton) The answer to my question is Yes?

A. Yes.

Q. You did not do that, did you?

A No, sir.

[2288] Q. Were you instructed not to?

A. No, sir.

Q. Then do you feel it is utterly irrelevant as to whether these things are expensive or not?

A. Insofar as our preparation ——

Q. Mr. Robinson, the question can be answered yes or no. If you want to explain it you can explain it after you answer it or on redirect.

Do you think it is irrelevant or not?

A. From our standpoint, yes, sir.

* * * * *

[2303] Q. Did the instructions state they were to include bad order cars?

A. The instruction for a count of cars on line is to count all cars on line.

Q. Both serviceable and unserviceable?

A. That is right.

Q. If in that example of the ten-day turnaround time the originating carrier were chargeable with two per diem days of the turn then his cars would be on line 20 percent of the time, would they not?

A. Yes, sir.

Q. If the carrier owned an inadequate car supply would that change these proportions, this 10 percent and this 20 percent, in these two examples?

A. No. The ratio of system cars owned to system cars on line, it would make no difference.

Q. It would change the percentage of total cars on line if there were other foreign cars on line, though, would it not?

A. Yes.

Q. Is there any percentage of cars on line which is so low as to indicate an inadequate ownership?

[2304] A. I think so.

Q. Is there any national percentage so low that it would indicate inadequate ownership in the entire fleet?

A. No.

Q. Is it then your view that these figures are not relevant to the adequacy of the fleet?

A. To the adequacy of the fleet?

Q. Yes, sir.

A. I don't think they have anything to do with the adequacy of the fleet.

Q. Or with the fleets of the individual railroads?

A. I don't think they have anything to do with the individual railroad's ownership.

Q. A railroad owns 3,000 boxcars, let us say. What percentage of boxcars on line indicates that it is not getting a proper return?

A. I don't think you could answer that without knowing something about that particular railroad.

* * * * *

[2361] Q. On page 110 of your statement you refer to the lines, by which I assume you mean rail carriers, which have invested heavily [2362] to acquire a sufficient number of freight cars to meet the needs of their patrons. Which lines are these?

A. I have not said, and I don't think I am in a position to judge the adequacy of the ownership of any particular carrier.

Q. You refer to other lines "owning relatively fewer cars who overcome their deficiencies by using foreign cars indiscriminately." Which lines are those?

A. I give the same answer. I have not said, and I am not prepared to judge the adequacy of ownership of any particular carrier.

Q. Is it possible all of the railroads might fall in the first category?

A. Not quite, inasmuch as there are a few that do not own any cars.

Q. Even they would not necessarily fall in the second category, would they?

A. Not necessarily.

Q. Is it possible that all the railroads might fall in the second category?

A. It is possible. But I don't think that it is true. It is certainly possible.

Q. Is there anything in your testimony, your statement, or your exhibits, that would enable us to determine which railroads are which?

A. No, sir.

Q. Then now can we determine that some railroads make up their [2363] deficiencies in ownership by using the cars of others, if we don't know who is deficient in the first place?

A. I don't know, Mr. Walton.

Q. Is what you mean here really that when dislocations occur some railroads may have more than they need and others may not have enough? Or do you really want to point the finger and say that some railroads are using foreign cars indiscriminately and some railroads that have invested enormous amounts of money and have a more than adequate fleet still do not have their fair share of cars? You seem to be saying the latter in your written statement. In your cross examination in answering that last question you seem to be saying the former.

A. I think some railroads do, in some car categories, own sufficient equipment and that other railroads in those same categories do not.

I think the non-observance of the car service rules permits such a condition to exist. But I have not pointed the finger at any particular railroad, and I am not in a position to do so.

Q. If you cannot tell me which railroad owns enough equipment—Can you tell me that, as to any railroad?

A. I cannot demonstrate that, no, sir.

Q. What is this opinion based on? Anything in your exhibits, any particular exhibit?

A. The widespread non-observance of the car service rules, * * *

[2366] Q. So if he had 100 cars involved in that traffic he would have 30 cars on line for his loadings?

A. Yes, sir.

Q. Under those circumstances if he had 30 percent of his ownership on line so far as that traffic was concerned he would be able to meet his loadings without difficulty, right?

A. Yes, assuming the loadings were steady and the movements were steady; yes, sir.

Q. Isn't it true you can't take any fixed percentage of ownership on line and know whether a carrier can meet his loadings by relying on his own cars, or whether he will have to have foreign cars, or, indeed, whether he will be able to meet his loadings with both combined, without knowing the traffic characteristics and the turnaround time, what you call the rate of return of cars?

A. Yes, I think that an individual carrier would have to know those things.

Q. And as a matter of fact, on the Monon the traffic characteristics you experienced there would indicate that a 40-percent ownership of boxcars on line would give you an adequate ownership to meet all of your loadings with home cars, I gather, or [2367] with home plus foreign cars.

A. That is about the way they should operate.

Q. The Monon very rarely achieved that level, did it?

A. Of home cars at home?

Q. Yes.

A. I never have known it to achieve that level since I have been acquainted with it.

Q. Do you believe that indicates that its ownership is inadequate?

A. No. It has nothing to do with it.

Q. Is there any way to determine from your statement and your exhibits as opposed to those of any other witness for the Bureau in this proceeding whether or not the general car supply is adequate?

A. I think, Mr. Walton, that I had an exhibit—I don't recall the number of it—of the reported shortages for an extended period of time. And I believe that that—Yes; excuse me.

It is Exhibit 28. It shows the reported shortages of plain boxcars on October 15, October 15 of each year for the years 1951 to 1965, inclusive. That is the only specific exhibit that I prepared that would indicate the magnitude of car shortages; or the existence of car shortages.

• • • • •

[3122] Q. And there is nothing in the rules intended to affect that?

A. Oh, they would affect it, all right. If a railroad is unable to handle all of the traffic which it originates, because it is unable to supply all of the cars which it needs—and we will assume at the moment that it has an adequate ownership—it will secure more loads by reason of the return of its system cars.

Conversely, if a railroad has an inadequate ownership of cars of a particular type and is overcoming that inadequacy by appropriation and misloading of cars owned by other carriers, and it is required to observe the proposed rules, then its loadings, rather obviously, would decrease, unless it improved its ownership. And that is the purpose of the proposed rules.

Q. So the rules themselves would have apparently on some roads a substantial economic impact in either decreasing or increasing the amount of revenue the road could earn in its freight cars?

A. We think so.

Q. What roads?

A. I am not prepared to say. That would involve personal, or the direct, judgment of the adequacy of ownership of individual roads. I don't think I care to do that.

Q. Can you make such a judgment on this record?

A. I don't think so.

* * * * * *

[3141] Q. Thus, if your rules were in effect presumptively the carrier would earn more on each of its own general purpose boxcars.

Is that your view?

A. In total, or per load?

Q. Per load. It would have it for more loadings, therefore ——

A. It would earn more in total. I don't think it would affect the revenue per load.

Q. And it would earn less on foreign cars?

A. To the extent that it used fewer foreign cars, yes.

Q. Well, it would not have any effect on the total amount it earned, would it?

A. If the carrier were encountering car shortages because other carriers were holding its cars off line for their own use and by reason of the rules returned the cars to the owner, the owning carrier would earn more.

Q. On the other hand, if the carrier were having car shortages because it had a deficient ownership and if your rules [3142] aggravated the deficiency it would earn less?

A. It would earn more on the cars it already owns, but it might earn less in total.

Q. Less in total?

A. Yes.

Q. Is there any way to be certain that so far as your rules are concerned in apportioning the cars among carriers that any particular carrier will earn more or any particular carrier will earn less as a result of these rules?

A. I don't think so, no.

Q. That is because we don't know which carriers are deficient and which are not?

A. That is right.

Q. Indeed we do not even know if any carriers are deficient, do we?

A. I think we know that the carriers as a whole are deficient. As to the individual carriers I am not so sure that we know.

* * * * *

[3192] Q. I gather from the thrust of your paragraph 4 that perhaps the principal reason for the mandatory appli-

cation of certain parts of these rules is that it will enable originating carriers to make estimates of car earnings. Is that correct?

A. No. The principal reason is that we think that it will encourage the carriers that may be deficient in car supply to correct their deficiencies.

Q. Well, will anything in these rules add to the ability to make reasonable estimates of car earnings without consideration to whether the car is home or foreign that is going to be used in transporting the traffic?

A. Well, if you know that your cars are going to come home on the average, say, twice a month, and you know that you have [3193] loadings available, and if you know further that you cannot protect all of the loadings that you anticipate with the normal mix of foreign cars that became available to you, you will know that you have to adjust your ownership in order to protect all the traffic that is offered.

You can estimate the number of loaded car movements that you would not be able to originate unless you changed—unless you increased your car ownership. And you know what the average earnings of these car movements are. Therefore, you can estimate what you will earn if you buy an additional number, X number, of cars of a particular type.

* * * * *

[3196] Q. Would it be possible to achieve 100 percent compliance?

A. It would be rather difficult. I doubt that you would get it.

Q. With some one and a half million cars it would, I submit, be impossible, would it not, to achieve 100 percent compliance?

A. Most anything is possible, if everybody wants to do it bad enough. But I doubt the practicality of it.

Q. Therefore, it is your testimony that it would be possible to achieve 100 percent compliance?

A. It would be possible, but not very likely.

* * * * *

[2661] A. Well, at the present time, I think the reported shortages have to be ignored, they are so inaccurate.

Q. Well, assume that we had accurate shortage data that would satisfy you. Would you ignore the potential loadings that are reflected by those shortages, in your computation of the individual road's ownership requirements?

A. Well, if they were real shortages the individual road, certainly their marketing department, would take into account the shortages in computing their needs for cars.

Q. So that could go into your formula, or outline the method you outline?

A. Oh, yes. Yes. As I say, with a big "IF", if you could ever determine what the shortage really is.

Q. I would like to discuss that with you a bit.

You say these reported shortages lack a reasonable degree of uniformity and quality.

A. Yes.

Q. And you make this statement, or you draw this conclusion, as far as the special reports in this proceeding, as well as the CS-44 reports.

A. Yes.

Q. Is this true of the New York Central's reported shortages?

A. Yes.

Q. It is?

[2662] A. Yes, because we have no way of knowing what a true shortage is. Suppose we have a team track at Kankakee, Illinois, served by three railroads, and the shipper reports a shortage of a boxcar for each of the three railroads. That is three boxcars in the national shortage report. And suppose he goes on for seven days reporting that, that is 21 cars, and he needed one car. It is pretty frustrating to figure out what is the actual shortage.

Q. Do you know of any instances where you have had unreal orders, such as you have just described?

A. Well, 35 or more years ago I worked on the Northern Pacific up in the Dakotas, and Minnesota, right in the grain territory, and we knew that these grain elevators would ask for 10 cars when we were allocating cars when cars were

tight, when they needed only 2, figuring they would be allocated maybe 2 or 3 cars. And they reported that for the whole week. And this goes on on every railroad. This is the way these things work.

I would be less than truthful in saying that no railroad actually knows what the actual shortage is. And some of these railroads during the grain season report a greater shortage than they could possibly even load, if they had the cars. There is not that much grain in all the grain elevators on this railroad. We know that, and they know that.

Q. But you have not made any study to determine how much these orders are inflated?

[2663] A. No, sir. I don't know how an individual railroad could.

Q. Then your conclusion is based more on the potential of inaccuracies than the fact of inaccuracies, is it not?

A. No: Everybody knows, every railroad knows, that it is inaccurate. Every railroad that makes a report knows their shortage reports are inaccurate. They have no way of getting an accurate report.

Q. Then I guess you are saying when the Central filed its special reports in this proceeding, it knew they were unreliable?

A. The shortage report, yes, sir. Yes. We have to say that.

Q. Wouldn't it have been better to have advised the Commission of this, rather than filing ——

A. I think the Commission knows it just as well as we do. No railroad has ever denied it. If they have, I think they would perjure themselves.

Q. You don't have any opinion as to the per cent of the inflation?

A. It varies with different roads, because of the different commodities they handle. It is not uniform by commodity, it is not uniform by territory.

I have worked all over the United States, and I would not know how to set up a formula for this railroad or that railroad or the other railroad. . . .

* * * * *

[2682] Q. Then your objection is not to contributing to a national pool in times of emergency or shortage, is it?

A. No. We are darn glad, if we have cars we don't need, we are darn glad to get per diem for them.

Q. I understood you were complaining of a situation

where you had less than your plain boxcar ownership on line.

A. That is right. Then we don't want to short our customers because somebody else gets our cars. That is what we buy them for, and that is what they sit around for during these periods when nobody wants them.

* * * * *

[2694] Q. (By Mr. Walton) Along that same line, sir, is it going to improve the accuracy of the CS-44 reports or any other reports of the railroads, if this Commission orders that those same reports be renedered to this Commission and that the person who renders them swear that they are true?

A. It will greatly enhance the accuracy of the reports and they will be much more timely.

Q. If the Commission orders them to be submitted to the Commission?

A. Oh, no.

Q. I think you misunderstod the question. Would you like to have it read?

A. Yes.

(Question read)

Q. (By Mr. Walton) The "it" does not refer to the computer system, but refers to the Commission merely ordering that these same reports now submitted to the Association of American Railroads be submitted to this Commission, and that they be submitted verified, sworn to.

Is that going to improve their accuracy?

A. No, I do not believe it would, because they don't have the capability now of giving timely and accurate reports until [2695] something like this is done.

Q. These reports that are not timely and accurate now, it is the function of the computer to make them timely and accurate?

A. That is right.

Q. Can that be done without the computer system?

A. No, sir.

I should qualify that: they can be more timely and more accurate than they are without the computer, but still they would not be timely enough or accurate enough to really be reliable.

Q. Right. To be useful, in other words?

A. Useful, yes.

Q. And I assume you are speaking, as far as usefulness is concerned, in terms of car distribution?

A. That is right.

* * * * * *

[3418] Q. I don't believe you mean to say that the reported shortages on CS-44 which are the result of Government grain movements are any less reliable than reported shortages at another time, is that right?

A. Are less reliable?

Q. Yes, the figures which are reported are less reliable.

MR. WALTON: Objection, no foundation laid as to whether the reported shortages are based on any source, much less based on a particular source, such as the shipment of Government grain.

EXAM. SWEENEY: The objection is overruled.

THE WITNESS: I don't believe they are reliable at any time so I don't know how they could be "less reliable" then.

I believe I say "in duplication of car orders," in the last four words of that paragraph, which has been testified to over and over again by experts, that this happens all the time, by shippers.

Q. (By Mr. Bybee) What do you mean by your statement that "Some of the elements which could have an effect on shortages are Government grain movements"?

A. Like I explained before, these could cause shortage reported [3419] in any manner to be ballooned during any period. It is kind of hard to talk here without defining the period you are studying. And the Bureau picked the month of October 1964 to study. Now I cannot say there were Government grain movements in that period, I don't know, but there well could have been. But there were possibly other elements in that time that would distort the shortages.

My point is that shortages are distorted, they have no place in a formula, because there are too many variables in here, and you have nothing constant you could follow.

Q. So it is the ballooning of the shortages you are talking of in that sentence?

A. That is true, yes.

Q. That is true of such elements as strikes, and the other elements that you list in your sentence there?

A. Duplication or pyramiding of orders, and so forth, yes.

Q. In the next paragraph you talk of shortage figures which are the result of overordering by shippers and pyramiding of such orders by agents.

As I understand your testimony, now, these are the conditions which lead you to believe that the shortage figures are inaccurate?

A. Yes.

* * * * *

[3569] EXAM. SWEENEY: Yet you think that having followed those instructions you would still come up with approximately 50 percent error in the reported shortages?

THE WITNESS: I think the shortages that we reported during the month of October for the benefit of Ex Parte 241 were possibly a litle more valid than normal because we did again caution all of our forces concerning the importance of accurate reporting. But we did use and submit to the ICC the total of all shortages reported across the system.

EXAM. SWEENEY: In other words, if you followed the Commission's instructions it still was not possible to get rid of a substantial amount of what you consider error in reported shortages?

THE WITNESS: That is correct.

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[3721] Q. So I don't understand why you then say that the mandatory car service rules 1, 2, 3 and 4 should be limited to an interim basis.

A. I think I mentioned in response to an earlier question that the data processing system may lead to identification of some better rule.

Q. Don't you think you ought to maintain the mandatory rules until you have determined from this data processing system whether that could lead to something better?

A. But I am not sure of the effect of what the mandatory effect of the application of the rule or these rules might be. If it causes serious harm to some people in some parts of the country, then apparently the rule, or the rules, may not be in the best interests.

The philosophy of the thought here is: Make the rules mandatory for a period of time when you are collecting the data, and see exactly what the picture is.

Q. And then when you get the results of the fully-installed data system, you will reconsider the advisability of retaining the rules as mandatory?

A. I don't know that the rules should be made mandatory for a longer period of time than it takes for the test data collection [3722] period. I don't think I could be an advocate either of continuing the rules mandatory indefinitely or terminating them at a specific point of time.

I think the mandatory application of the rules is essential for a good test. That is as far as I could possibly go.

Q. And I don't suppose you could predict when a good test would be completed, at this time?

A. No, sir.

I don't think it could be tomorrow or this year. There is still in development, I believe, the automatic car identification, and its implementation on a vast base.

* * * * *

[3833] A. Well, it is a commonplace observation and general knowledge with respect to the figure you want to name that when tightness of supply begins to develop, hoarding is encouraged. We could say this with respect to the freight cars, with respect to sugar, we could say it with respect to runs on banks. This is a simple observation of human behavior.

When people think they may not get "Johnnie-on-the-spot" what they think they are going to want, they begin to take steps to—hoard, I think this is the right word.

Q. So you base your conclusion on the logic of the conditions on which the statistics are based?

A. Very largely, yes. You must understand that I am not myself actively in the field of car supply management. This is not the area in which I operate. It is not the purpose of my reply statement to pose as an expert in car supply management, but rather to expose the fallacies in Mr. Kline's statistical methodology.

Q. Of course, in doing that, you have to give us some information which you believe is adequate to demonstrate that the methodology is wrong, isn't that right?

A. And I have done so, including his failure to take into account car surplusses as well as car shortages. One cannot properly look at only one side of this particular coin.

Q. I understand. This is your testimony.

Now, to go back to the tabulation of the shortages for the [3834] 10-year period, do you believe that the overstatement which you attribute to shortages increases in percentage as the loadings increase?

A. I would not see any necessary relationship there, no. I would rather say that what you are likely to find as a matter of simple logic is that when tightness increases, the tendency to inflate the car shortage figures also rises.

Q. There are more shippers who are concerned?

A. Who are concerned, that is right.

Q. Then you would agree with me that probably the real shortages, accepting your proposition, in the last 5 years have been somewhat greater than they were in the 5 previous years, for plain boxcars?

A. I have to agree to this extent, that this is what the figures presented by Mr. Kline show, that we are both looking at.

Q. Do you not accept these as the daily average shortage figures reported on the CS-44 Forms?

A. I accept them as the reported figures. Whether they truly represent freight car shortages is quite another matter.

* * * * *

JAMES G. MANNING

(Western Wood Products Association).

[4032] Q. Do you recognize that any railroad's equipment procurement policies must be geared to what the industry it serves is able to pay for and are willing to pay for in terms of car equipment?

A. Yes. We feel this is our problem. We have the western railroads geared to this philosophy of what we need; they build these cars and they are pretty attractive and take a [4033] long time to get back to the West Coast.

Q. What types of cars are you speaking of?

A. The large-cube boxcars.

I don't know where the flatcars go. They disappear, too. We are short of them.

Q. I gather that you have no personal knowledge of what happens to these cars after they leave your area or your plants?

A. Well, we have had railroad officials in the West, because we are on their backs, try to defend themselves and run a survey of what happens to these cars. And they have loaded a new car in Oregon, for example, and it has been six months or more before that car is returned to the West.

* * * * *

[4036] Q. Turning to specialization in use of equipment, I have before me a page of advertisements from Traffic World of the Southern Pacific, indicating that in 1963 it began a program to convert older boxcars to more efficient wide-door design and through that method it has added more than 700 wide-door cars to its fleet. Then I quote: "All of these converted cars are assigned to forest products service."

Do you ——

A. I am familiar with that.

Q. Is there a pool of cars used and does this—does this refer to assignment in the sense of a pool administered by a railroad of cars for a particular use or particular industry or location?

A. These cars were single-door 40-foots that they converted to a 10-foot opening. In the process of conversion they took out the car lining and put on a 10-foot door and

put a big yellow diagonal stripe on the door and stenciled the car "When Empty Return to Eugene, Oregon."

To this extent they were made a pool-assigned car to the forest products industry with the understanding no one else would want a car that had no lining in it, and when for example [4037] it got to Atlanta, Georgia, it would be returned to Eugene as an assigned car to the Southern Pacific agent at Eugene.

Q. That is specialized then both as to type and use?

A. That is right.

Q. Has this type of development been of benefit to your industry?

A. Well, more benefit to the plywood industry than to our industry. But it has been I would say beneficial to us, yes.

Q. At least to the extent it got the cars back to the West Coast?

A. Yes.

Q. And this would apparently, according to your information, suggest that the return movement was an empty movement.

A. That is right.

* * * *

[4043] if it does not provide reasonably adequate return on the investment of that equipment to be maintained in storage waiting for peak demands?

A. Let me answer that my first concern is a selfish one for the forest products industry. What the railroads do for others unless it affects us really I feel is their problem. As long as they take care of us, we feel the rest is their problem.

We have a steady need for car supply and we feel that we are entitled to it.

* * * * *

Q. Do you believe there is a better method than relying upon the managerial discretion of the railroads using informed judgment including information you and other shippers furnish to them as to the numbers and types of cars they should operate?

A. Yes. To the extent we can convince certain railroads that we depend upon for a certain type of equipment and they build that and then we don't have the availability of it for reasons beyond their control, or ours, then something more should be done.

Q. May I assume you have no personal knowledge as to whether or not the lines that serve you do or do not have an adequate supply of cars as compared with the other railroads in the country that they have indicated to you may be using their cars?

A. I will answer this way: We get in these periods of severe [4044] shortages and we go to the western railroads and we are told "We have enough cars, we can't get them back."

We go to the AAR and they say there is no problem, or this and that, the cars are equally distributed.

Then we go to the ICC and a service order is issued favoring the western railroads and the shortage is, lo and behold, over in the matter of a week.

To us this demonstrates possibly what we are told is true, there is maldistribution, otherwise the service orders would not be so fruitful.

Q. Because the Commission entered a car service order

A. An order ordering the western line ownership home.

Q. Is that the only basis you have to support the claim of the western lines that the shortage is ——

A. Well, the information they furnish is that this car was built new and loaded such and such a date, and it was six or eight months before they got it back, and this type of thing.

Q. Would you prefer to rely upon the western lines you have named for adequacy of car supply to your industry or have to look to all of the railroads of the country whether or not they serve your area?

A. We look first to the western roads. We feel this is their responsibility, to have adequate ownership to handle the business in the West.

If it is true that the other railroads are participating in [4045] this—we are told for example by the western railroads that they have to build a certain type of equipment because they participate in business coming from the East, and if this is true we want the same participation by the eastern railroads or the southern railroads in this type of car that we want.

Q. Are you representing anything more as far as you know than the viewpoint of the western railroads that you have recited here in terms of your Association's position?

In other words, have you made an independent determination of the proper contribution to the needs of your industry by the various railroads in this country?

A. No.

Q. Is it correct, then, that you rely upon the railroads that serve your area for the car supply you need?

A. Right. With the stipulation that rules be established, or something, so that these western railroads' ownerships are returned.

Q. Do you have any knowledge of the fact that the Association of American Railroads by its board of directors adopted what is called a car ownership responsibility formula which would relieve these western railroads of a portion of the ownership they would have if they assumed the full responsibility of owning cars needed for your industry and transferred that ownership responsibility to other railroads?

A. I am vaguely aware of this formula, or proposal, yes.

* * * * * *

[4061] Q. I refer you to page 3 of your statement, the last full paragraph, the last sentence.

There you state that this situation you describe has not been alleviated, then you say that, "This is due to the fact that other railroads have appropriated cars to their own use."

What railroads have appropriated cars?

A. This gets back to the assumption that the eastern and southern railroads, and midwest railroads I will put in the category, when they receive a load of forest products in western ownership that car is then sent in different directions other than west.

Q. You used the word "assumption." Do you mean by that you don't know who appropriated your cars?

A. We know who appropriated them. That is the way they were [4062] classified, the railroads, in the service order that was required to get them back.

The Great Northern and Northern Pacific were down to less than 50 percent of their ownership on line. These are published, established figures. If this goes on for a period of time, as it did, somebody has their cars, and they were not in the West.

Q. And I guess that proves their ownership is adequate?

A. It is an indication to us it is adequate when they are returned to them, they handled our shipments.

Q. Did this service order prohibit them from using the cars of other railroads, or are they allowed to continue to do that?

A. As far as I know they were allowed to use anything that was on from the West. But, you understand, very few come out w[illegible] in the beginning.

Q. Can we go back to the question I asked, then? Do you know what railroads appropriated these cars that belong to the railroads which serve your members?

A. Well, generally. I could not tell you what railroad had what car, other than on certain cars where studies were made which I referred to to Mr. Macdonald, in which a new car was loaded for the first time on its own line in the West and a record was kept of the car, and it was over six months before it hit the West again.

Q. This is one car?

[4063] A. No, there was a series of cars. This was the SP&S Railroad. I don't have that statement here. I do recall seeing it. This was quite a concern to the traffic manager of this particular railroad.

* * * * *

[4065] Q. One of those told you but you couldn't recall which one?

A. Several times. The first thing we do when we get a car shortage is to start hounding our western railroads, "What has happened? "Where are the cars?" And this is a common story at the advisory board meetings.

Every proceeding of the Pacific Northwest Shippers Advisory Board, for example, has the superintendent, the man that is there responsible for this particular railroad, getting up and explaining why they don't have cars on line.

Q. And they always tell pretty much the same story?

A. That is right.

Q. Usually eastern roads, isn't it, that appropriate those cars?

[4066] A. Well, generally, because this is our biggest market, in the East; it is where our business goes.

Q. You go on and say in addition to this fact that other railroads have appropriated cars that belong to the railroads which serve you that the reason for this appropriation is that it is more economic to pay the relatively low per diem charges than to build cars.

Have you done any study of per diem charges to determine whether they are adequate or not?

A. No. Well, to the extent that I am familiar with per diem charges it is hard for me to feel they are adequate based on the value of the cars under question.

Take a car we are talking about, maybe it cost $15,000 to build, and then the per diem level that was in effect in 1965, I believe, was $2.85 at that time.

Q. That is very interesting about 1965. What was the per diem rate on a $15,000 car, if you know?

A. I would—as I recall, around seven or eight dollars; I don't know at the moment.

Q. You do not consider this adequate?

A. I wouldn't want to be in the business. But that is none of my affair. That is managerial discretion. You understand that when I made this statement in 1965 you did not then have this graduated per diem.

[4067] Q. Mr. Manning, are you sure you are willing to swear to that?

A. Well, I better not, I guess.

Q. Have you done any study to determine whether a rate of $3 for all cars or a rate of $2.88 for all cars or a rate of $7 or $8 for a $15,000 car is adequate or inadequate, is compensatory or noncompensatory?

A. No, other than the extent that this is the story we continue to get, the eastern lines are keeping the cars, it is cheaper for them to rent them on this daily basis than to spend the $15,000 to build a comparable car to add to the fleet.

Q. Do you recognize there is a rule of the Association of American Railroads presently in effect which requires a road to load a foreign car in preference to its own car if it can be loaded to or in the direction of home?

A. I also recognize that AAR rules have no teeth in them and what they require and what happens are two different things, and why we finally have to get an ICC service order to prescribe the very thing the AAR service order reads.

MR. WALTON: I move to strike the answer and ask you to instruct the witness to answer the question.

EXAM. SWEENEY: Your motion is denied.

Q. (By Mr. Walton) Do you know that the Commission in this proceeding has proposed that this car service rule to which I referred be made mandatory?

A. I am aware of that.

[4068] Q. Would you be in favor of that?

A. I would say yes, with some modifications. In fact, I took that position with the NIT League, who took the opposite view, on the basis that we in the West are not going to benefit from AAR rules unless there are some teeth in them.

This was very evident in all the objections to the Commission statement when all the views were made known, because time after time some shipper, usually in the East, was saying "This causes us inconvenience to take a Western car and send it West when we have a shipment going East."

This is the very thing that concerns us about the AAR rules, is that they look fine on paper but the shipper is not going to pay attention to them if it is inconvenient, and the railroad is not going to upset his shipper.

* * * * *

[4117] Q. Would an increase in the use of this type of control in the return of the cars be of benefit to your members?

A. It definitely would be helpful, yes.

We have not advocated that too much. We would prefer to see 100 percent of ownership on line of the various carriers serving our industry. If we had that I think most of our car supply problems would be licked.

* * * * *

[4163] Q. Have you made any analysis of the rules at all with that in view so you could tell me which rules the violation——

A. Well, car service rules, per se, with no teeth in them, from a practical standpoint just don't do the job they were cut out to do.

Q. And what is that job, in your view? To give the owner absolute control of his car?

A. No. To—well, that would be part of it. But also it should promote the free interchange of freight cars, and so forth.

Q. Promote the free interchange of freight cars?

A. Which we have as part of the basic AAR rules; and give each carrier suitable cars to handle the business tendered to him, which does not obtain under the existing rules. It does obtain pretty well when we get an ICC service order that puts teeth in them. Some of these ICC service orders merely put the effect of the law behind the existing AAR car service rules, [4163-A] and then we get the cars back.

Q. To give the owner absolute control over his freight cars, right?

A. It just gets it back to him, so he can do with it as he sees fit, yes.

* * * * *

[4167] Q. Suppose the Commission made the very rules mandatory upon which you are attempting to place a penalty, in other words, make them mandatory by fiat without penalty. Would that achieve the purpose you wish to achieve by this rule?

A. It all depends on which rules you talk about. The ones back there, the proposed new ones now, or ——?

Q. The present proposed rules of the AAR.

A. I think the car supply position of those carriers serving the plywood industry would improve if the AAR car service rules were made mandatory.

Q. Have you discussed that with the carriers?

A. I don't have to discuss it with the carriers. You asked what I thought about it, and I told you.

MR. WALTON: Would you read the question?

(The question was read.)

THE WITNESS: I gave you an answer, and you asked if the railroads told me that. And I said it was my own opinion.

MR. WALTON: Are you going to answer the question?

THE WITNESS: I have answered it.

MR. WALTON: May the Witness be instructed to answer the question?

EXAM. SWEENEY: I thought he did.

THE WITNESS: That is what I thought. I answered it.

[4168] Q. (By Mr. Walton) Did you consult with the carriers about this, Mr. Hilton, or not?

A. Abo t what?

Q. About whether or not a mandatory rule——

A. No, let's back up. You asked me whether or not if the AAR existing car service rules were made mandatory it would help us, and I answered, "Yes, it would."

Q. Have you discussed that position with the carriers?

A. I don't have to discuss that with the carriers. You asked me right now, and my answer is I think it would.

[4491] A. No, sir. If you were going to use any formula I find that the Gunderson so-called formula falls far short of being adequate to measure car requirements.

Q. As to the reasonable period within which you feel railroads are required to satisfy shippers' stated car orders, do you feel that use of a 24-hour period through the year, through seasons of lean activity and through peak activity, is a reasonable period?

A. No, sir. I think the 24-hour requirement is extremely unreasonable, insofar as being the time in which we get an order and have to fill this order. I find this extremely unreasonable.

Q. If the railroads in complying with the criteria set up by the staff of the Commission in making responses in this proceeding had used that 24-hour period rather than the period you feel is reasonable, do you feel that this would overstate or understate shortages reported consistent with those criteria?

A. I think our reporting with the criteria the Commission laid down overstates substantially shortages that might exist.

* * * * *

[4660] Q. I would like to have you explain what are the defects in these figures that were gathered which you consider makes them unreliable even as a guide.

A. Well, we as a committee in searching for information that was available learned that the Car Service Division of the Association has available to it all of the information that had been submitted by the railroads in reply to the questionnaires in Ex Parte 241.

I am sure I can speak for each member of the committee. Each of us had in some way on our railroad known the difficulty that had obtained in endeavoring to assemble these figures. So we looked at them carefully.

We asked for the assistance of some programmers, telling them what we were looking for, asking them to make certain analyses through the computer. When I say "certain analyses" I am talking of the separation of interline car days, reclaim days, no car days, and the other items that were presumed to be a part of the information that was provided.

Very frankly, the answers we got were, within the knowledge of our committee, such that we could not accept them. We tried to check and see why these impossibilities occurred. And I do not recall at the moment any number of specific details. I recall one railroad that had a local turnaround time of less than two days, and it was a railroad over 1,000 miles long. If you look at these things practically you know they are not right. [4661] It just couldn't be.

And of course we know the number of questions that were asked based upon the instructions that were issued by the staff of the Commission to the railroads, the questions that were answered by them, and we just felt that this particular statistical compilation, or whatever it was, could not be used.

It had another, very definite disadvantage, very definite to me and to the rest of the committee: It covered a single month's operation. It started at the beginning and abruptly ended at the end, with no carryover to either direction. So it couldn't be considered correct, because business in this large, complex operation of railroads does not start or stop in a month.

[4667] A. We were influenced as an Ad Hoc Committee by the questionnaire eliciting information for use in this proceeding, in Ex Parte No. 241.

In our efforts to design a plan for the future that would give information to the railroads on a regular, scheduled basis and to the Association, particularly the Car Service Division, for their use in this general car distribution job that they have to do, we felt it would be necessary to have as much detail as was asked for in Ex Parte No. 241. We realized in covering this detail that we would have to go somewhat further because Ex Parte 241 started and stopped with one calendar month, there were things that occurred that affected the month that were not considered, there were things that occurred in the month that affected that which followed, that were not considered.

The report made by the railroads at that time did not identify cars unloaded, by types. To us as a Committee, this appeared to be a void that had to be filled, to show us what was available at a particular point or general locality or on a railroad, in a period.

We *felt that* making an internal study of this was quite ponderous, quite impossible to have it done with any degree of regularity, accuracy, acceptance, and similarly by all who contributed to it. That is why we recommended that this be done on a timely basis, and be extended to be done continuously now.

* * * * *

[5602] Q. Let's assume a shipper which does have a large supply of cars, a large private fleet. It might be efficient for the consignees of the freight to use these cars for shipping their own freight.

A. Exactly.

[5603] Q. And you would not expect owners of these private cars to tolerate that kind of use of their equipment, would you?

A. Oh, I think so. We have just gone through the pains of a study as to car ownership of a particular type of car. And we would be very desirous of utilizing that equipment in the reverse direction, either foreign goods going to market, or leasing it to someone, a third party, to get it back to the original point of origin.

Q. But you want it to go back to the original point of origin——

A. Oh, yes.

Q. —which is where you load your freight.

A. Oh, yes; by all means. Yes, sir.

Q. Why do you believe that the railroad owner of freight cars should be deprived of this same right of having its equipment returned to its place of business?

A. He should be entitled to the right to have it returned to his place of business.

Q. But unless you have some kind of control, some method of controlling the utilization of equipment he has no assurance that it is going to come back to his place of business. Isn't that right?

A. We are hoping that out of this proceeding the Commission will come up with some rules and regulations, some decision, which will certainly improve the situation as it exists today.

If the carriers followed their own rules I imagine there [5604] would be less shortages in certain areas of the country than we have experienced.

Q. Would it be correct to conclude that you would not oppose the imposition of mandatory rules by the Commission?

A. We would oppose it, very much.

Q. You would?

A. Oh, yes.

Q. Any mandatory rules?

A. Exactly. We don't—the carriers need flexibility. Mandatory rules do not provide the carriers with that flexibility.

(Interstate Commerce Commission)

[3] Since the introduction of the principle of free interchange of cars between carriers efficient use of cars has been a major concern. Railroad management to cope with this problem voluntarily established car service rules. These rules and the accompanying per diem schedules have provided the best plan railroad management has been able to devise for efficient car utilization. One inherent weakness in these rules is the lack of sanctions which encourage adherence. There has been widespread disregard of the rules at times since their adoption.

The Commission has attempted to alleviate the car-supply problem largely through the issuance of service orders requiring the prompt handling of cars by carriers, return of certain specific ownership to owning lines, restricting the loading of certain cars to specified areas, imposing penalty charges for detaining cars, restricting light loading of cars, reduced free time on cars awaiting unloading, restricting the circuitous routing of traffic, and many other items tending to improve utilization of the freight car fleet.

Although freight car shortages may develop with an adequate freight car ownership, it is impossible to prevent shortages if the car ownership is inadequate. One of the purposes of this investigation is to determine whether the ownership of freight cars by respondents is sufficient to enable them to furnish adequate car supply to meet normal as well as peak loading period demands.

[4] The purpose of the Interstate Commerce Commission order, dated July 29, 1964, issued in this proceeding was to obtain specific and current information on the adequacy of freight car ownership and to develop facts to the prescription of rules to alleviate the recurring problem of freight car shortages.

Exhibit No. 1 is a record of Class I freight car ownership, aggregate carrying capacity and average capacity per car owned for the ten year period December 31, 1955, through December 31, 1964. These figures were obtained from annual reports submitted by Class I railroads to the Commission as required by the Interstate Commerce Act. The Interstate

Commerce Commission summarizes and publishes these reports in "Transport Statistics in the United States."

A decline not only in ownership but also in aggregate carrying capacity of freight cars is shown in Exhibit No. 1. A decline of 12.4% in total freight car ownership and of 5.0% of aggregate carrying capacity is established in column 12, of Exhibit 1. To compensate for the loss of 5.0% aggregate carrying capacity during the ten-year period studied, it would be necessary to add 84,871 cars to the national freight car fleet.

ICC DOCKET NO. *EX PARTE NO. 241*

EXHIBIT NO. *1* (1 PAGE)

WITNESS: *H. S. KLINE*

TOTAL CLASS I RAILROAD FREIGHT CAR OWNERSHIP: AGGREGATE CAPACITY OF FREIGHT CARRYING CARS (TONS) AND AVERAGE CAPACITY PER FREIGHT CAR (TONS) AS OF DECEMBER 31st OF EACH YEAR FOR THE TEN YEAR PERIOD 1955 - 1964

EXHIBIT NO. 1, PAGE 1

	1955	1956	1957	1958	1959	1960	1961	1962	1963	1964	Net Change 1964 Compared with 1955 Cars - Tons	Percent
Box Cars-General Service-Owned	661194	673747	685330	672402	654718	637829	608367	577106	545751	515123	-146071	-22.1
Aggregate Capacity	32069290	32838781	33554089	33027112	32231700	31516371	30131570	28854485	27256508	26011853	-6057437	-18.9
Average Capacity	48.5	48.7	49.0	49.1	49.2	49.4	49.5	50.0	49.9	50.5	+2.0	+4.1
Box Cars-Special Service-Owned	57956	53912	53624	52553	52848	54900	56565	62354	71611	83220	+25264	+43.6
Aggregate Capacity	2750547	2619480	2615680	2570237	2600931	2659971	2820827	3185931	3827749	4532304	+1781757	+64.8
Average Capacity	47.6	48.6	48.8	48.9	49.2	48.5	49.9	51.2	53.5	55.8	+8.2	+17.2
Total Box Cars Owned	719150	727659	738954	724955	707566	692729	664932	639460	617362	598343	-120807	-16.8
Aggregate Capacity	34819837	35458261	36169763	35597349	34832631	34176342	32952397	32040416	31084257	30544157	-4275680	-12.3
Average Capacity	48.4	48.7	49.0	49.1	49.2	49.3	49.6	50.1	50.4	51.2	+2.8	+5.8
Covered Hopper Cars Owned	42406	46952	54567	58833	61479	64255	65856	69378	73216	81168	+38762	+91.4
Aggregate Capacity	2900218	3232932	3788247	4081023	4257993	4450432	4607498	4990907	5277842	6026778	+3126560	+107.8
Average Capacity	68.6	69.3	69.4	69.4	68.8	69.3	69.9	70.6	72.1	74.2	+5.6	+8.2
Gondola Cars (Steel) Owned	260536	277402	277530	278016	270971	265950	256431	249080	236738	222897	-37639	-14.4
Aggregate Capacity	16837705	16740543	16825436	16995817	16638835	16444857	15905792	15530137	14790132	13678446	-3159259	-18.8
Average Capacity	60.0	60.3	60.6	61.1	61.4	61.8	62.0	62.3	62.5	63.2	+3.2	+5.3
Gondola Cars (Open Top) Owned	506449	503462	521376	512489	489486	480445	462149	440368	431712	421781	-84668	-16.7
Aggregate Capacity	29565788	29594701	30936977	30567028	29207285	29104512	28074515	26980951	26754513	27114350	-2451438	-8.3
Average Capacity	58.4	58.8	59.3	59.6	60.0	60.6	60.7	61.3	62.0	64.2	+5.8	+9.9
Stock Cars Owned	37922	36830	35717	33727	31791	30800	29427	26567	24647	22445	-15477	-40.8
Aggregate Capacity	1505729	1461623	1417698	1338455	1251000	1212691	1156753	1046878	976538	890871	-614858	-40.8
Average Capacity	39.7	39.7	39.7	39.5	39.4	39.4	39.3	39.4	39.6	39.7	--	--
Flat Cars Owned	56124	55962	54923	52066	52719	52714	51931	49979	49785	48257	-7867	-14.0
Aggregate Capacity	3003529	2934413	2957287	2845688	2872940	2922581	2885563	2782513	2777649	2650668	-352861	-11.7
Average Capacity	53.5	52.4	53.8	54.0	54.5	55.4	55.5	55.7	55.8	54.9	+1.4	+2.6
Refrigerator Cars Owned	19491	20010	20210	20041	20041	25527	28054	29457	33965	39822	+20331	+104.3
Aggregate Capacity	768010	781165	797554	797587	872477	1210869	1328579	1482347	1785143	2084380	+1316370	+171.4
Average Capacity	39.4	39.0	39.5	39.7	42.5	47.4	47.4	50.3	53.5	55.1	+15.7	+39.8
Other Freight Cars Owned	36375	38186	42444	43211	44433	45872	45431	45778	45891	48662	+12287	+33.8
Aggregate Capacity	1815555	1937400	2190897	2268787	2331848	2424682	2378112	2455936	2496827	2737049	+921494	+50.8
Average Capacity	49.9	50.7	51.6	52.2	52.5	52.9	52.3	53.6	54.5	56.4	+6.5	+13.0
Total Freight Cars Owned	1693014	1706843	1745721	1724228	1676366	1650292	1604241	1550067	1512306	1481385	-211629	-12.5
Aggregate Capacity	91229260	92161038	95083869	94486434	92264509	91947166	89292229	87223695	85942901	86071909	-5157351	-5.7
Average Capacity	53.7	54.0	54.5	54.8	55.0	55.4	55.7	56.3	56.8	58.2	+4.5	+8.4

SOURCE: Class I Railways, Annual Reports (1955 - 1964) to Commission.

I.C.C. Docket No. *Ex Part No. 241*
Exhibit No. 8 (10 pages)
Witness *H. S. Kline*

This Exhibit in 10 pages, is divided into five sections as follows: Section I, Plain Box Cars, pages 1 and 2: Section II, Equipped Box Cars, pages 3 and 4: Section III, Total Box Cars, pages 5 and 6: Section IV, Gondola Cars, pages 7 and 8: and Section V, Hopper Cars, pages 9 and 10.

Each of these five sections are separated into the record of ownership, installations of cars by type of acquirals, retirements of cars, new cars on order, and the percent of each carrier's ownership as related to the United States total ownership on December 31, 1961, and on December 31, 1964.

TOTAL GONDOLA CAR OWNERSHIP, INSTALLATIONS, RETIREMENTS AND CARS ON ORDER

CLASS I RAILROADS - 1962, 1963, 1964

ALL CLASS G

RAILROADS	OWNERSHIP Dec. 31, 1961	OWNERSHIP Dec. 31, 1964	OWNERSHIP Net Gain or Loss	OWNERSHIP Percent Gain or Loss	INSTALLATIONS 1962-1964 Purchased New or Rebuilt	INSTALLATIONS 1962-1964 Leased First Term Otherwise Acquired	INSTALLATIONS 1962-1964 Total Installed	INSTALLATIONS 1962-1964 Percent Installed to 1962 Ownership	RETIREMENTS Total Retired 1962,1963 1964	RETIREMENTS Percent Retired to 1962 Ownership	ON ORDER Sept.1, 1965	PERCENT OF TOTAL OWNERSHIP Dec. 31, 1961	PERCENT OF TOTAL OWNERSHIP Dec. 31, 1964
EASTERN DISTRICT													
Ann Arbor	0	9	9	-	0	9	9	-	0	-	0	-	-
B & Aroos	5	5	-	-	0	0	0	-	0	-	0	0.002	0.004
B & Maine	821	781	-40	4.9%	0	0	0	-	40	4.9%	0	0.320	0.302
Central Vt.	0	0	-	-	0	0	0	-	0	-	0	-	-
D & H	1,113	1,078	-35	3.1%	0	0	0	-	35	3.1%	0	0.434	0.434
D L & W	0	0	-	-	0	0	0	-	0	-	0	-	-
Erie-Lackawanna	1,179	837	-342	29.0%	25	18	43	3.6%	385	32.7%	0	0.460	0.376
G T W	4,275	4,289	42	1.0%	200	1,182	1,382	32.3%	1,340	31.3%	237	1.866	1.933
L & H R	1,290	1,288	-2	0.2%	0	0	0	-	2	0.2%	5	0.858	0.581
Lehigh Val.	2	2	-	-	0	0	0	-	0	-	0	0.081	0.001
Maine Central	2,493	2,099	-392	15.9%	0	28	28	0.7%	415	16.6%	0	0.972	0.943
Monongahela	390	388	-2	0.5%	0	0	0	-	2	0.5%	0	0.152	0.174
Monon	0	0	-	-	0	0	0	-	0	-	0	-	-
N Y C System	459	421	-38	8.3%	0	0	0	-	38	8.3%	0	0.179	0.189
N Y C & St L (2)	17,841	14,907	-2,934	16.0%	0	0	0	-	2,635	16.0%	0	6.997	6.891
N Y N H & H	(5,931)	(1)	(1)	(1)	(500)	1	(1)	-	(1)	(1)	0	2.325	(1)
N Y S & W	479	476	-3	0.6%	0	0	0	-	3	0.6%	0	0.189	0.214
P & L E	0	0	0	-	0	0	0	-	0	-	0	-	-
Pitts. & W. Va (1)	8,991	8,327	-664	8.0%	0	0	0	-	664	8.0%	125	3.592	3.736
Wabash (1)	(597)	(1)	(1)	(1)	-	-	-	-	-	-	0	0.233	(1)
	(1,882)	(1)	(1)	(1)	(300)	(401)	(701)	(1)	(1)	(1)	0	0.726	(1)
TOTAL													
ALLEGHENY DISTRICT													
A C & Y	79	44	-35	44.3%	0	0	0	-	35	44.3%	0	0.031	0.020
B & O	11,810	10,499	-1,311	11.1%	0	1,117	1,117	9.5%	2,423	20.6%	0	4.622	4.710
B & L E	1,602	1,396	-209	12.9%	10	16	26	1.6%	232	14.5%	0	0.625	0.626
C N J	1,844	1,001	-843	45.7%	0	425	425	23.0%	4,268	68.8%	0	0.219	0.449
Long Island	0	0	-	-	0	0	0	-	0	-	0	-	-
Pennsylvania	41,134	31,590	-9,544	23.2%	0	524	524	1.3%	10,068	24.5%	428	16.044	14.172
P R S L	0	0	-	-	0	0	0	-	0	-	0	-	-
Reading Co	5,115	3,848	-1,267	24.8%	748	0	748	14.6%	2,015	39.4%	0	1.395	1.726
S I R T	0	0	-	-	0	0	0	-	0	-	0	-	-
Union (Pitts.)	Now	Switching	& Terminal	Carrier	-	-	-	-	-	-	0	-	-
Western Md.	2,029	1,974	-55	4.6%	275	38	313	15.8%	408	19.7%	0	0.827	0.886
TOTAL													

* * * * *

Car Service Rules Exhibits

[55] Exhibit 24, comprising of six pages, is a summary of 58 field examinations of the carriers practices in the loading of box cars towards owners, in compliance with rules of the Association of American Railroads Code of Car Service Rules two and three. A total of 3763 cars were checked of which 1837, or 49.8% were loaded in violation of the existing Code of Car Service Rules.

Three specific examples of Car Service Rule violations are given for each of the 58 cases in the summary.

[56] In computing violations of Car Service Rules in this exhibit it has been assumed that such system cars as were loaded were loaded because suitable foreign cars, under the rules, were not available, hence, the loadings of system cars reduced the percentage of violations.

There is no discernible pattern of above or below average performance whether based on geographical location or on origin railroad. Although there are a few extremely high percentages of violation such as the 93.9% violation on the NYC at Moraine, Ohio, 90.5 on the CRI&P at Enid, Okla., 85.7 on the TRRA at St. Louis, Mo., 80.0 on the SL-SF at Arkansas City, Kans., 78.9 on the S.P. at San Leandro, Calif., and 76.5% on the ACL at Atlanta, Ga., most of the violation ratios are fairly close to the overall average of 49.8%.

Exhibit 25 is a statement of 287 common box cars loaded by Lincoln Electric Company, Cleveland, Ohio, during May, 1964, showing, in addition to arrival, placement, and release data, destination and route of each car. This industry is served by both the NYC and NKP(N&W). Each of these carriers furnished cars for loading as indicated on the statement.

The study was completed on April 9, 1965. One hundred and sixty-five cars, or 57.29% of the total cars listed in Exhibit 25, were loaded contrary to existing Car Service Rules.

The study also shows that these 288 cars were held empty for prospective loading by the two carriers for a total of

1520 days, an average of 5.3 days lost, between availability and placement, for each car loaded. No demurrage record or [57] charges were made by either the NYC or the NKP for the periods between date first available and date actually placed. Exhibits 14 and 22, previously presented, reveal other aspects of the practices of the NYC and NKP in furnishing cars for loading by Lincoln Electric Company.

Exhibit 26 is a 16-page detailed study of the loadings of unassigned cars by Pittsburgh Plate Glass Company, Barberton, Ohio, during the month of June, 1964. The serving carrier is The Akron & Barberton Belt Railroad Company, a switching line owned jointly by the Akron, Canton & Youngstown, the Baltimore & Ohio, the Erie-Lackawanna and the Connecting Railway, a railroad operated and leased for 999 years by the Pennsylvania. The study was completed on May 7, 1965.

The ABB owns no cars for revenue freight service. In making the study any car owned by the proprietary companies and used for local movements on the ABB was considered to have been loaded in compliance with Car Service Rules.

Section I of exhibit 26 covers the observance of the Car Service Rules in the loading of common box cars. Four hundred and forty-one of these cars were loaded of which 356, or 80.73% were loaded in violation of Car Service Rules and only 85, or 19.27% in compliance.

Section II is the Car Service Rules Observance record of 42 unassigned, equipped box cars loaded. Seventeen, or 40.48% of these cars were loaded in violation of Car Service Rules. Twenty-five cars, or 59.52% were utilized in compliance with the rules.

[58] Section III covers six gondola cars loaded during June, 1964. Four loadings, or 66.6% were in violation of Car Service Rules. All six of the gondola cars loaded were furnished by the ABB from cars made empty at other industries on its line.

Section IV covers the loading of 71 covered hopper cars. Although these covered hopper cars were not classed as assigned to Pittsburgh Plate Glass Company by the carriers, shipping orders and waybills covering 42 shipments, or 59.2% of the total, contained the notation: "When empty return to Pittsburgh Plate Glass, Barberton, Ohio, via reverse route," or "When empty return car to shipper via reverse route."

The meticulous care in observing ownership in the routing of traffic in these covered hoppers is notable in contrast to the disregard of ownership in the loading of other cars and is illustrated by the following examples:

The usual route for traffic destined Carteret, N.J. was EL-CNJ. This route was used for all shipments except one, on which an ACY covered hopper instead of the customary EL car, was applied. The shipment loaded into the ACY car was routed ACY-NKP-LV-CNJ.

* * * * *

[59] Exhibit 27 is a two-page statement showing for the 19-year period 1947-1965, inclusive, that has elapsed since the report in docket 29669. The exhibit shows the percentage of system cars owned by Class I carriers that were on home lines on the first and fifteenth of each month during this period. These percentages were computed by the Car Service Division of the Association of American Railroads from reports submitted by each Class I carrier twice monthly. For the two-year period 1961 and 1962 the location statements for the 15th of the month were not printed and distributed by the Association.

In its report in Docket 29669 the Commission took note of the then existing dislocation of box cars, pointing out that on March 1, 1947, there were but 16.4 percent of box cars owned located on owners' rails. Exhibit 27 traces these percentage indices of location of home cars from 1947 to 1965.

The statistics show an increasing percentage of cars owned that were on owners rails from the spring of 1947 until the end of February 1950, when a period of increased dislocation began. This period ended in June of 1951, when the percentages of owned box cars on home lines again began to increase. Interrupted only by a short decline in mid-1953, this relocation of box cars to owners' rails continued [60] through January, 1955. Commencing in February, 1955, there was again a sustained period of increasing dislocation of box cars extending throughout 22 months, until December, 1956. The period from December, 1956 through May, 1958, was marked by rapid relocation of box cars on owners' rails, culminated by a stable period during the first portion of 1958, when a 12-month period of increasing dislocation again began. From mid 1959 until October 1964 there was a period of relative stability in the per-

centage of owned box cars located on owner's rails differing, however, from other periods of general stability in that the fall periods of greatest dislocation grew in intensity and duration each year, and that each year there was slightly less recovery than in the preceding year. In 1965, the maximum percentage of owned plain box on owners rails reached a high of 36.9 on two occasions but remained in the low 30 percent range virtually all of the first ten months of the year. A rapid decline began in September and continued without interruption to the end of the year. At year's end the percentage of owned box plain cars on owners' lines was 29.9, the lowest in eleven years. Further, there was only .7 percentage points recovery from December 1; to December 15, 1965, the lowest recovery rate since 1950 when there was no recovery at year end.

Comparison of the indices of mislocation of box cars presented in Exhibit 27 with average daily car shortages for the years 1955 1964, inclusive, shown in witness Kline's Exhibit No. 4, to which should be added the record of average daily car shortages for the year 1965, shown in the immediately following table, shows a close relationship between the magnitude of the average daily car shortage and the index of the location of freight cars on owners' lines.

[61] Average Daily Box Car Shortages—Jan. 1965 through March, 1966 (From AAR Statement CS 44-A)

Month	Plain	Equipped Box Cars	Total
January, 1965	1392	107	1499
February	3152	189	3341
March	4790	91	4881
April	4096	95	4191
May	3546	84	3630
June	3502	68	3570
July	2534	50	2584
August	3615	86	3701
September	4253	155	4428
October	8164	156	8320
November	9569	205	9774
December	5598	91	5689
January, 1966	5222	74	5296

February	10,774	168	10,942
March	12,706	210	12,916

The table below extends the data shown on Exhibit 27 through January, February and March, 1966.

Percent of Box Cars Owned By
Class I Railroads Located on Owners' Lines
(Home Cars on Home Roads)

Date	Kind		
	XM	XAP	All
January 1, 1966	31.7	45.2	34.2
January 15, 1966	31.5	45.3	34.0
February 1, 1966	29.5	43.9	32.2
February 15, 1966	28.9	43.7	31.7
March 1, 1966	27.7	42.9	30.6
March 15, 1966	27.8	44.2	30.9

These data are compiled from Association of American Railroads Statement CS-8A. The kinds of cars grouped under each of the three column headings are the same as is shown on Exhibit 27.

It should be noted that although the percentage of plain box cars on owners' lines, increased slightly during January, it again resumed its long decline in February, 1966. [62] Exhibit 28 consists of one page. It is a statement compiled from Association of American Railroads' Reports CS-8A, CS-44 and CS-61A. The latter report was combined with report CS-8A effective January 1, 1963, and is no longer issued as a separate report. The statement shows, for plain box cars, by primary districts, the average daily car shortage, the car ownership, the percentage of the system car ownership on line, and the percentage of all cars, regardless of ownership, on line of cars owned. All statistics are for October 15, of each of the fifteen years 1951 to 1965, inclusive, except for 1961, for which year October 1 figures were substituted because one of the source documents, CS-61A, was not distributed for October 15.

Noteable is the precipitous decline in ownership of 117,538 plain box cars, or 43.2% by the Eastern District carriers during this 15-year period. The plain box car ownership by the Southern District carriers declined by 23,395 cars, or

24.1% during this same period. By contrast the decline in plain box car ownership of the Western District Carriers was 16.3% or 49,213 cars. In all districts the greatest declines in plain box car ownership occurred during the last nine-year period.

* * * * *

CONCLUSIONS

[90] Witness Kline's exhibit five has established the existence of frequent major shortages of various kinds of freight cars. It has shown that these shortages are predominately in the various general service types of cars rather than in more specialized types, such as equipped box cars. His exhibits one through four have shown a continuing decline in the ownership of the very types of cars which are in short supply while at the same time the ownership of specialized types has grown sufficiently rapidly as to avoid major shortages of these cars. His exhibits have demonstrated a substantial loss of aggregate carrying capacity of freight cars owned by U.S. Class I railroads that has not been offset by increased ownership of cars [91] of other types or by greater average capacity of individual cars. In view of a decreased freight car ownership and a decrease in aggregate carrying capacity, it would be reasonable to expect that the utilization of the remaining cars would be more efficient in recent years than in prior years. Yet precisely the opposite has occurred. Witness Kline's Exhibit No. 6 shows a substantial increase in the average number of days required for each car to complete a loading cycle and a corresponding decrease in the number of loaded movements obtained from each car during any given period of time.

Exhibit 1 shows that at the time of preparing statistics for the Commission to be used in this proceeding the Class I respondents expected to decrease their ownership of plain box cars substantially during the one-year period ending October 1, 1965. The anticipated ownership reduction was 19,211 plain box cars, the very group of cars most in demand as evidenced by the carriers' own reports of shortages (Witness Kline's Exhibit No. 9). At the same time the carriers expected to install 14,582 additional equipped box

cars, although their own reports showed that only minor shortages of equipped box cars occurred in October of 1964.

The assignment of freight cars to specific shippers is usually the result of efforts of the carriers to meet the peculiar needs of their patrons for the transportation of certain commodities in bulk, free of contamination by residues of previous loads; to reduce, or eliminate, packaging and blocking requirements by means of load restraining devices permanently or semi-permanently affixed to the cars; to provide cars of particularly easy access to permit use of mechanical devices [92] for loading or unloading; or to insure an uninterrupted supply of freight cars of a particular type.

In virtually all car assignments, the assignment is the result of an agreement between carrier and patron although not all such agreements are available in written form.

In Exhibit 4, I have summarized the results of 28 investigations of the utilization of assigned cars. The average number of days each of these cars were held idle for prospective loading was 6.3 days for each load generated. Although each of these assigned cars was held for the exclusive use of a single shipper, not one days' demmurage was assessed for any of these prospective loading days.

In Exhibit 5 an assignment is detailed in which the cars load only once each 23.7 days and one in which the cars remain idle for long periods of time when there is no demand for the product being transported. In spite of the poor utilization of these cars, the carriers not only declined to reduce their car assignment but indicated instead their intention of increasing the number of cars assigned to this shipper.

Exhibit 6 is the only assigned car exhibit where loaded movements in both directions were observed. In most instances, assigned cars, by the very fact of being assigned to specific shippers and origins, are one-way cars. In this particular instance the ability of only three cars of an assignment of sixteen cars to handle return loads with regularity reduced the overall turn-around time on the entire assignment by 4.1 days or 16.9% and avoided the need for an assignment of five [93] cars at the Freemont, Michigan plant which could have resulted had not return loading been permitted.

Because the design of some cars prevents their general

use, because of fears that if loaded at any other point they will not be returned to their normal assigned point, or because of possible loss of removeable parts when used outside of assigned services, assigned cars are seldom reloaded between release at destination and return to assigned point. Consequently, these cars usually return empty at substantial loss of productive car days compared with cars in general service.

In discussing Exhibit 7 it has been shown that although the cars assigned are classified by the three car owners as being of XML type they are not in fact so used and, because of modifications, cannot be used as XML-type cars. By improperly registering these cars in the official Railway Equipment Register as "XML" cars the three car owners have made them subject to AAR Circular CSD 145-U and are securing their empty return to Winston-Salem regardless of the provisions of Car Service Rules 2 and 3 which are applicable to the handling of general service cars.

Exhibit 7 contains a sample of bills-of-lading carrying instructions for the empty return of these cars, of two waybills indicating compliance with these instructions and of a form letter from the agent of one of the origin carriers indicating assignment of these cars to a specific shipper. The discussion of the Exhibit quotes the assignment stenciling that appears on each car in this assignment.

Since these cars are, in fact, used exclusively as common box cars, it seems reasonable to conclude that the purpose of this car assignment is to provide a single [94] shipper with an assured supply of box cars rather than to control the return of specialized equipment.

Exhibit 8 is an example of a car assignment that has been permitted to get completely out of hand. In our investigation it was found that cars were placed on shippers' tracks without orders and without assessment of demurrage. The correspondence carries repeated references to conversations with the shipper relative to the magnitude of these two assignments and infers that assignments were not adjusted until after such conferences were held. The exhibit shows that this shipper enjoyed an over-abundant supply of cars in both pools during October, 1964, a period during which the Lake Region of the Norfolk & Western (former Nickel Plate) certified to this Commission average weekly shortages of 280 plain box cars. (Witness Kline's Exhibit No. 9.)

Exhibit 12 shows by the assignment lists prepared by the General Electric Company, rather than by railroads, and by samples of the correspondence between the General Electric Company and the railroads contributing cars to the assignment, the degree of control exercised by the General Electric Company. Clearly, the cars are ordered by this shipper and are confined to his exclusive service. Attached to each shipping order is a pre-printed empty car waybill (Exhibit 12, pages 36 and 37) directing the return of the empty cars to Louisville. The carriers, on their part, side-stencil the cars for return empty, some even to the extent of including the name of the shipper in the stenciling. Empty car waybill samples reveal the cars returning empty, some billed direct to General Electric, from points as remote as California, [95] New England and Florida. The per diem reclaim recovery of approximately $60,000 each by the two serving lines during the year 1964, gave these lines substantial financial assistance. Their ability to pass to other carriers a substantial portion of the cost of the idle car days accumulated by cars held for prospective loading, doubtless made it easier to comply with this shippers' requests for additional cars. Likewise, the lack of any demurrage or detention charges on cars held idle for prospective loading removed from the shipper any necessity of tempering his requests for assigned cars by a requirement to balance potential demurrage expenditures against the expected benefits of the exclusive use of a large group of assigned cars. Had each of these assigned cars been placed in General Electric Company on arrival empty, or constructively placed if it could not physically be placed, the demurrage charges would have been substantially higher, since only in two months on the Southern and one on the L&N could there have been excess credits to offset the additional chargeable days. If only half of the estimated 39,120 car days that were reclaimed had earned demurrage at the then minimum demurrage rate of $5.00 per car per day, additional demurrage of $97,800 would result in a year of comparable performance.

The possibility of additional demurrage charges of this magnitude would necessarily become a major item to be considered by this shipper in its calculation of the number of cars it asked the carriers to assign. In the event that the L&N and Southern did treat subject cars to demurrage from

date of arrival empty at assigned point, and the car utilization remained at the same level as in 1964, the estimated $98,000 additional demurrage revenue would obviate the need for the Per Diem Rule 22 [96] reclaim procedure, and might well give these two lines the financial incentive to acquire the cars needed to protect the requirements of their own shipper.

Exhibit 16 relating to the assignment to a group of covered hopper cars to Olin-Mathieson Co., Blockson Chemicals Division, served by the GM&O at Joliet, Illinois, contains a substantial volume of correspondence obtained from three of the railroads having cars in this assignment.

In reviewing this correspondence, the following should be noted.

1. Resistance of shipper to any removal of cars from the assignment. (Letters reproduced on pages 23, 60, 63, 66 and 67.)

2. Action of the shipper in endeavoring to control assignment of cars to the pool by suggesting certain favorable or unfavorable re-alignment of traffic. (Reproduced on pages 8, 28, 39, 52 and 74.)

3. The function of Per Diem Rule 22 in making the assignment of foreign cars acceptable to the serving carriers. (Letters reproduced on pages 18, 19, 20, 23, 24, 25, 26, 27, 28, 29, 31, 34, 35 and 37.)

4. The somewhat belated actions of both the B&O and PRR in removing cars from this assignment because of unsatisfactory levels of utilization. (Various letters and papers in both the B&O and PRR correspondence.)

The correspondence from the PRR files shows numerous instances where PRR personnel recommended removal of some of the PRR cars from the service, yet the PRR assignment increased from five cars in March, 1964 to eight cars in July and finally to ten by the end of the year. The PRR utilization study accompanying the letter [97] dated April 8, 1965, and signed "WJB", covered the months of November and December, 1964, and January and February, 1965. It shows detentions as high as 44 days at Joliet awaiting loading. This record also shows that five of the ten cars were returned empty to the PRR by the GM&O on December 18, and were out of the assignment for varying periods of time. One, PRR 260079, was still out of the assignment at the end of April, 1965.

A second utilization record accompanied Mr. Logsden's letter to Mr. L. J. Horan, dated May 4, 1965. This study, covering the months of March and April, shows eight cars active, one out of assignment and one unserviceable because of accident. Detentions at Joliet as high as 36 days are shown. Even though there were two less cars active in the service in March and April, 1965 than in November and December, 1964, the number of idle days at Joliet was excessive.

In the correspondence abstracted from the B&O files, the concern of the B&O because of under utilization of their cars first becomes evident in a letter from Mr. James J. Lean to Mr. R. E. Coleman dated January 3, 1962: The subsequent letters indicate continuing excessive loss of car days by B&O cars assigned for the remainder of the period covered by the correspondence. Commencing with a letter dated January 30, 1964, from Mr. A. M. Brinker to Mr. W. L. Ollerhead there is evidence of concern over the Per Diem Rule 22 reclaims being allowed to the GM&O and a suggestion that a portion of the B&O cars be removed from the assignment. On February 27, 1964, Mr. Ollerhead writes to Mr. J. H. MacAnanny to the effect that "Mr. Kollman requests that the remaining ten cars be allowed to [98] stay in the Joliet service." Mr. Kollman was the Product Transportation Manager of the shipper. Subsequently, after additional Per Diem reclaims were presented by the GM&O to the B&O for payment (Mr. Ollerhead's letter to Messrs. Freeman and Brinker dated December 22, 1964) the B&O did remove five cars from the assignment. (Letter dated March 2, 1964 from Mr. Ollerhead to Mr. Brinker). In spite of the extremely low volume of traffic routed B&O during November (14 cars) and December, 1964 (3 cars), and January, 1965 (8 cars), Mr. Kollman is stated by Mr. Freeman in his letter to Mr. Kollman dated March 16, 1965, as being "greatly exercised" and as protesting "vigorously."

It seems clear from the correspondence reproduced that the shipper, Olin Mathieson, clearly and definitely requested the assignment of cars to its exclusive use and that it strongly resisted all efforts to make downward adjustments in the pool. On the other hand, although this shipper does hold many cars in its possession during the loading process and does pay substantial amounts of demurrage as a result,

it does not permit the placement or constructive placement of assigned cars on arrival empty at Joliet. The statement in the left hand column of page 6, showing cars detained for prospective loading for as many as 43 days, not subject to demurrage, and the empty car order reproduced as page 88 clearly verify the absolute control of Olin over the acceptance of demurrage responsibility for empty assigned cars.

Olin also endeavors to assume control over the return of empty assigned cars by means of the postal car tracers reproduced on pages 86 and 87. These [99] tracers are sent to each receiver of Olin's products for which assigned car is used for shipment. When prepared and mailed promptly they enable Olin's traffic department to actively trace the empty return of assigned equipment, both to prevent movement delays and to prevent its appropriation for use by other shippers.

The general assignment data reported by the carriers in their certified reports to the Commission in this proceeding, and compiled in Exhibit 1, clearly showed that railroads in all geographical areas were assigning substantial numbers of cars for specific loadings, Exhibits 4 through 18 offer complete confirmation of these widespread practices.

Evidence presented by Witness Kline in his Exhibit No. 6 has shown excessive average turn-around times and extremely high ratios of car days to loaded movements of equipped box cars, a type of car of which 73.3 percent of the ownership has been reported by the carriers to be in assigned services (Exhibit 1).

The specific studies of assigned cars, Exhibits 5 to 18 inclusive, those which are summarized in Exhibit 4, and those of controlled, unassigned cars, Exhibits 19 to 23, inclusive, clearly reveal why these cars do not produce the transportation other cars produce, viz., the holding of these cars empty for the convenience of a relatively few favored patrons without the securing of bona-fide car orders and without assessment of demurrage and, for the assigned cars, long empty return movements to loading points.

In some instances the interior fittings of equipped box cars have been removed and the cars are used as common box cars in assigned services. In other [100] instances common box cars have been assigned. The inevitable conclusion is that the real purpose of the car assignment is

often to guarantee certain favored shippers the exclusive use of a specified number of cars, the competitive position of the various carriers seeking to handle the traffic being the sole criteria in determining the assignment, with little consideration being given to the effect of the assignment of these cars on the ability of the carriers to serve other patrons whose traffic is not believed to be susceptible to diversion or is believed to be less advantageous to the carriers. Exhibits 7 and 17 give specific examples of the assignment of XM-type box cars, or of the removal of interior fittings and use of equipped box cars as common box cars.

Exhibits 16 and 17 are clear revelations of the major influence competitive conditions have on the carriers' assignment of cars. In the Union Pacific assignment at Garfield, Utah (Exhibit 17), the Vice President-Operations of the Union Pacific frankly admitted to fears of traffic losses to competitors if the car assignment were reduced. In the GM&O assignment of covered hoppers at Joliet, Illinois (Exhibit 16), the correspondence duplicated from the files of three of the carriers having cars in the assignment, reveals the attempts of each of the lines, including two not serving the shipper, to control the routing of the traffic by assigning cars of a size desired. This exhibit also presents a clear picture of the role of the shipper in securing an overabundant supply of assigned cars by control or hints of control of the routing of the traffic.

[101] Exhibits 5, 16 and 17 provide examples of the reluctance of the carriers to adjust their pools of assigned cars and of their open acquiescence in car assignments that result in cars standing idle for periods in excess of one month.

Exhibit 12, which furnishes information in considerable detail as to the workings of a large pool of nearly 1500 40-ft. XML-type box cars, contains a copy of two specific requests of the shipper for the assignment of additional cars to its exclusive service. While the letters contain neither threat of traffic loss, nor hope of reward, the mere fact that this shipper originates in excess of 1400 cars of freight per month is sufficient to make acquiescence almost mandatory.

In many of the assigned car exhibits, copies of instructions for return of the empty cars are included. Many of these instructions name the shipper to which the cars are

assigned. (Exhibit 7). In several instances empty, return instructions were stamped on bills-of-lading, or given by the shipper, on a pre-printed form, to either consignee or to agent at destination. (Exhibits 12 and 16). There is one instance of assignment lists issued to the railroads by the shipper. (Exhibit 12). One shipper prepares empty-car waybills and furnishes them to the originating carrier along with the shipping instructions and bill-of-lading. (Exhibit 12).

In Exhibit 8, there is shown a surplus of assigned cars of such magnitude that even new cars, of a design supposedly of critical importance to the shipper, had to be stored for a period exceeding three months, while cars previously in the pool remained in the pool awaiting the permission of the shipper to remove from the assignment.

[102] In this same Exhibit 8, as well as in many others, the practice of placing empty assigned cars on shippers' tracks on the vague grounds of "carriers' convenience" has been fully documented, as has been the extreme reluctance of some carriers to make adjustments in car supply for fear of antagonizing the shipper. (See also Exhibits 16 and 17.)

It is my opinion, based on more than 15 years of experience and substantiated by the evidence gathered by the Commission's field personnel for study in this proceeding, that there is no such thing as a voluntary assignment of cars by rail carriers; that all car assignments are the direct and specific results of requests for cars by shippers; that downward adjustments in the assignment of cars to a shipper are not normally made without notice to the shipper; that assigned cars are effectively removed from general car distribution and hence are denied to other shippers who are often required to await the carrier's ability to find unassigned cars of suitable type for their use even though assigned cars of a suitable kind are being held idle awaiting loading by a more favored shipper; that assigned cars frequently are placed on shippers' tracks in position for loading, or for placement by employees of the shipper, without specific car order; and that empty assigned cars so held either on carriers' tracks or within shipper's plants are not presently being subject to demurrage by most carriers.

Inasmuch as the assignment of cars, under present practices, gives to shippers the substantial and real benefit of

the exclusive use of a given number of cars without direct cost to the shipper, the only present controls over the magnitude [103] of any given car assignment are the willingness and ability of the carrier to limit effectively the assignment of cars and of the shipper to temper his demands for cars to a level that will permit the continuous use of the cars without excessive losses of car days for prospective loading. This, in large measure, neither carriers or shippers have done, as has been fully documented by the gross excesses shown in the various assigned car exhibits.

In the area of controlled, but unassigned cars, much the same condition exists with respect to car supply as in the assigned car studies, with the important difference that in the controlled but unassigned cars the initiative is often with the sales personnel of the carriers who openly encourage shippers to request a specific ownership of car for transport of an anticipated but unknown shipment. These car requests are not placed with agents assigned to responsibility for point of loading and, in fact, are seldom known to these agents. These cars are frequently held empty on, or sent to lines other than car owner and held free of both car rental and demurrage until actually wanted by shippers. The exhibits, again show that favored shippers are granted an assured supply of empty cars without necessity of payment of demurrage as would be required if bona-fide car orders had been required.

It seems obvious that, since no demurrage penalties are presently assessed, it is not reasonable to expect shippers to restrict their demands for assigned cars to the level that can invariably be loaded without delay. It is equally clear from the practices pictured in these exhibits, and from the various pieces of correspondence [104] relating to car assignments that have been reproduced into the exhibits, that the carriers are either unwilling or unable, because of competitive problems, to restrain the assignment of freight cars to reasonable levels.

The Bureau of Railroad Safety and Service therefore will propose the following rules which, in its opinion, will place sufficient financial burden on shippers and origin carriers alike as to confine the assignment of cars to a number which can be regularly utilized without excessive losses of car days while cars are held idle for prospective loading. (References to rules are to rules proposed by the Bureau of

Railroad Safety and Service in this proceeding not to presently existing rules of the Association of American Railroads.

Proposed Car Service Rule 11.

Prohibition of waiver of per diem, mileage or other car rental charges.

Proposed Car Service Rule 8.

All railroads shall become parties to Agent H. R. Hinsch's Freight Tariff 4-Series. Car Demurrage Rules and Charges.

Proposed Car Service Rule 12.

Requests for cars to be in writing and to be given line on which cars are to be loaded.

Proposed Car Service Rule 13.

(a) Requests for assignment of cars be in writing.
(b) Assigned cars will be subject to demurrage rules while waiting loading.
[105] (c) Assigned cars will be subject to demurrage when held empty enroute to loading point on instructions of assignee.
(d) Empty assigned cars will not be held enroute except under specific conditions.
(e) Empty assigned cars will be placed or constructively placed within 24 hours of arrival at loading or hold points.

It is the opinion of the Bureau of Railroad Safety and Service that the proposed rules, briefly outlined above, will continue to permit the assignment of cars to the extent that financial advantages to the shipper warrant his assumption of demurrage responsibility; that any assignment of cars that cannot be justified by assumption of demurrage responsibility will be discouraged; that responsibility for car supply will be returned to the origin carrier, which line will be in full control of both the supply and utilization of the cars and will be provided with additional revenues, through demurrage assessment, to assist in justification of ownership of such excess cars for which shipper is willing to assume demurrage responsibility; and that the practice of sending cars off-line free of both car rentals and demurrage for the purpose of influencing traffic routings will effectively be curtailed.

To provide a means of returning freight cars to owners the railroads have agreed upon a code of rules setting forth

the obligations of each carrier having possession of a freight car owned by another carrier, or having previously had possession of such a car, to return the car to its owner. These rules are [106] known as the "Code of Car Service Rules" and are published by the Association of American Railroads. (See Exhibit 3). They attempt to provide an orderly means for the return of foreign freight cars to owner by relating the burden of empty return to prior use, modified by certain geographical limitations. To minimize empty car miles, the rules permit loading of foreign cars to, via or in the direction of owners subject to certain limitations. The rules also prohibit the loading of system cars off-line when other suitable equipment can be used in accordance with the rules.

In 1947, in Docket 29669 (268 I.C.C. 687), after an investigation of car shortages, which were then attributed to an aftermath of war conditions, the railroads were ordered to file their Car Service Rules with this Commission. This has been accomplished by the transmission to the Secretary of a copy of the Code of Car Service Rules of the Association of American Railroads and of each amendment or revision thereof. However, this filing of the rules is not in tariff form and hence is considered to be of an informational rather than an enforceable nature.

The Code of Car Service Rules is also printed in the editorial section of each issue of the Official Railway Equipment Register, a document readily available to interested shippers and receivers.

A brief review of the portion of the Association of American Railroads Car Service Rules contained in Exhibit 3 is repeated for convenience at this point.

Car Service Rule 1 prohibits the loading of system cars off-line when foreign cars of suitable ownership and kind are available. The purpose of the [107] rule is to prevent the excessive mileage of empty cars that results when loaded system cars accompany equivalent empty foreign cars to or in the direction of similar destination areas.

Car Service Rule 2 prohibits the use of foreign cars empty at a junction with the owner except for loadings routed via the owner. The purpose of the rule is first to enable the owner to secure the immediate return of its car and second to avoid the build-up of potential empty mileage by possible loading away from the owner. The provision for loading to or via the owner eliminates the necessity of the

switching of empty cars between the two lines, in both directions, at the point where the car is held.

Car Service Rule 3 provides a means for the orderly return of foreign empty cars, at other points, to the owner. The rule attempts to minimize empty car mileage by encouraging loadings in the direction of the owner. In paragraph (c) it obligates the owner to accept its cars empty at any junction with one exception that is covered by Car Service Rule 6. Paragraph (d) requires the road previously handling a car to accept its return empty at the junction where it was originally delivered. This provision is modified where one of the two lines does not have a direct connection with the owner of the car. Paragraph (d) is further modified by paragraph (c) which relieves carriers handling a car exclusively in switching service of the necessity of hauling a car empty in road service for the purpose of returning the car to the owner. Special Car Order No. 90 referred to in the Note of Car Service Rule 3 (not introduced in exhibit form) is a plan, applicable [108] to plain box cars, by which empty box cars located on a line which has no direct connection with the owner are sent to the owner via pre-determined railroads and junctions, based on car ownership, without reference to the original receipt of the car. The purpose of Special Car Order 90 is threefold:

1. To minimize excessive empty car mileage that sometimes results from use of actual home routes.
2. To eliminate lost car days while empty cars are held to determine the proper off-going junction and home route.
3. To eliminate the excess switching of empty cars that frequently results when it becomes necessary to set them aside while a home route is being secured.

Car Service Rule 4 places restrictions on the use of freight cars by water carriers.

Car Service Rule 5 provides a means of short-routing empty cars when the road holding the car considers that normal return under other rules would be unwise.

Car Service Rule 6 provides a means of regulating the return of large groups of empty cars at junctions other than those used for their loaded movements. The purpose of the rule is to prevent carriers enjoying only a short haul on

loaded traffic being obligated to accept their system cars home at remote junctions which often are at, or close to the actual destination of the traffic. Invocation of the rule is usually limited to repetitive movements of large volume.
[109] Car Service Rule 7 defines the conditions and terms of the interchange of cars between railroads.

Per Diem Rule 19 provides for a Car Service Division of the Association of American Railroads to supervise the application of the Car Service and Per Diem Rules and to perform the other duties outlined in the rule.

Per Diem Rule 20 makes Car Service Rules 1 to 6, inclusive, applicable to Canadian owned cars while in the United States and United States owned cars while in Canada.

Per Diem Rule 21 is not at issue in this proceeding.

Per Diem Rule 22 authorizes the movement of empty cars off-line for prospective loading. It provides protection to the handling non-owner line from excessive per diem or mileage payments, which might otherwise result from such actions of the car owner, by permitting the holding line to reclaim a portion of the per diem or mileage payments from the owner of the car.

Exhibits 24 through 28 have documented the increasing location of box cars on lines other than the owner and have shown the major cause of such a condition, viz., failure of carriers and shippers alike to observe Car Service Rules 2 and 3. Exhibit 22 shows that, when the loading of cars to or via car owners was a necessary condition of receiving cars, the shippers did match loads and routes with cars so that cars returned loaded to owners. Exhibit No. 25 showed that this same shipper when loading general service cars, to which no compulsive car selection requirements were attached, loaded 57.29% of all cars away from car owners.

[110] Dislocation of box cars to the point where the vast majority are off owners' lines is not, of course, a cause of national car shortages, but rather a result of such conditions. However, when cars become so badly dislocated that less than 40 percent of owned cars are on home lines car shortages become unequally distributed and lines which have invested heavily to acquire a sufficient number of freight cars to meet the needs of their patrons are often deprived of the use of these cars while other lines owning relatively fewer cars overcome, in part, at least, their de-

ficiencies in ownership by using foreign cars indiscriminately.

Further, although similar freight cars may be, and are, used for many commodities having quite different loading characteristics, the cars that are purchased by any given line are those which will most nearly fulfill the shipping requirements of its patrons. Thus railroads which load large quantities of grain will tend to own large numbers of box cars with door openings suitable for grain service. Roads which originate large quantities of number will tend to own large fleets of 50-ft. box cars with 14-ft. or 15-ft. door openings. Other variations include car width, height, type of lining, and capacity, both cubical and weight carrying.

In addition, railroads tend to maintain their cars to the standards required to transport the traffic they originate. A road originating large quantities of machinery of various types will be concerned with the condition of the floors in its cars, but need not attempt to keep side and end walls in condition to load sacked products. On the other hand, railroads originating large quantities of [111] grain, flour, sugar, paper, cigarettes, etc., must maintain exceptionally high standards of car body condition to provide the cars its patrons must have.

When a car owner receives the use of its own cars, on an average of less than once each month as happens when less than 40 percent of owned cars are at home, and is required to rely heavily on foreign cars for loading, it is often difficult to find cars of the proper description and condition for the traffic offered even when the total number of available cars of the general type required may be adequate. If, in addition, the general car supply is inadequate railroads whose ownership of freight cars of the kind that is in short supply is adequate, or nearly so, often find themselves with even more severe car shortages than some other lines whose car ownership is deficient.

Under these conditions there is little incentive for railroad managements to purchase large fleets of cars for general service, nor to expend large sums of money in maintaining cars to high standards when, aside from per diem income, the sole beneficiaries are other lines. Although it is almost impossible to estimate the revenue earning capacities of the ownership, by a single railroad, of common

box cars used in general service, it is relatively easy to estimate the prospective income that will be derived from the purchase of cars that will be used in various forms of controlled services. Examination of the ownership statistics furnished by the carriers (Exhibit 1) and of those derived from other sources and presented by Witness Kline in his Exhibits 1, 2, 3, 7, and 8 clearly show the trend away from general service equipment and toward ownership of cars normally used in controlled services.

[112] The railroad industry has devised, in Car Service Rules 1, 2 and 3 (Exhibit No. 3) an admirable set of rules which, were they generally observed, would promptly and economically return cars to owners. If these rules were enforced each line would be compelled to adjust its freight car ownership and maintenance standards to the conditions peculiar to its own operation or accept the consequences of customer dissatisfaction and lost patronage.

Nearly fifty years ago, in Docket No. 9287, 42 I.C.C. 457, the Commission ordered the carriers to comply with a set of Car Service Rules with respect to open-top coal and coke cars and railroad owned or controlled refrigerator cars. The rules then prescribed, although somewhat differently worded, were substantially the same in effect as either the present AAR Car Service Rules 1, 2 or 3 of the proposed Commission Car Service Rules bearing the same number. It is interesting to note that the special report of three members of a Railroad Commission on Car Service, established in 1916, in the height of war-time shortages, gives the following reasons for its creation:

> "It is well established that the observance of car service rules with respect to returning equipment promptly to owners has in the past been to a great extent superseded by use or appropriation of cars by individual lines governed only by expediency. A disregard for the spirit and letter of the rules on the part of a great many railroads has gradually led to an unsatisfactory observance of such rules insofar as they relate [113] to the railroads collectively. This brought about a condition which rendered it impossible for some of the roads that had amply provided themselves with sufficient equipment to perform their obligations to the shippers directly served by them and their duties as carriers to the general public."

This Commission on Car Service attempted to relocate box cars, after study of location statements furnished by the railroads, but, on January 11, 1917, reported its inabilities to function effectively in this field because certain railroads failed to give it their full co-operation, in spite of their commitments.

Although the Interstate Commerce Commission did order the railroads to enforce certain prescribed Car Service Rules, effective February 21, 1917, it placed an expiration date of May 1, 1917, on its order and has since relied on voluntary actions of the carriers, reinforced by emergency orders of the Commission to insure an equitable distribution of freight cars throughout the nation.

In Docket 29669, 268 I.C.C. 687, Car Service, Freight Cars, this Commission on July 27, 1947, required the carriers to file their Car Service Rules, but again placed reliance on voluntary compliance to secure an equitable distribution of freight cars. In that case the Commission noted that violations of Car Service Rules were common and that such practices resulted in certain carriers having possession of excessive numbers of cars. The report acknowledged that relocation orders of both the Car Service Division of the Association of American Railroads and of the Commission itself were not as effective as had been hoped.

[114] Clearly, the results of fifty years' trials prove only that the immediate interests of the individual carriers take precedence over the observance of Car Service Rules.

It is my opinion based on many years of railroad service nearly all in Car Supply and Car Distribution duties, that the railroads use the Car Service Rules almost exclusively as a defense mechanism; i.e., as a means of easily disposing of surplus empty foreign cars and as a means of protecting themselves from handling empty cars they do not want and are not obligated to accept. These are legitimate and proper uses of the Code of Car Service Rules. However, the Car Service Rules have a more positive purpose than this; viz., a means of directing to the owner, preferably loaded, but in any event returning for its use, the cars which, in the judgment of its management, are needed to enable it to transport the freight offered by patrons located along its lines.

The evidence submitted in the assigned car studies and in the Car Service Rule studies plainly reveals the growing

lack of interest by railroad management in the operation of a large fleet of cars that, because of general disregard of Car Service Rules, earn little more than per diem receivable and repair bills payable, contrasted with controlled cars which, although subject to excessive empty mileage and over-large assignments, have the proven virtue of attracting measurable amounts of traffic to the car owner.

The continuing relocation of cars on owners' rails is of major importance to the maintenance of an adequate car supply for the following reasons:

[115] 1. Only the line serving an industry has complete familiarity with the industry's car requirements. Thus, the lines serving large numbers of grain shippers have owned substantial numbers of 40-ft. box cars equipped with 6-ft. single doors that are easily coopered to hold bulk grain away from the doorway. Lines serving major lumber producing areas will own large numbers of wide door box cars, both 40-ft. and 50-ft. lengths, to permit easier loading of packaged lumber. Other factors determining the choice of cars purchased may include cubical capacity, length, width, weight carrying capacity, load cushioning devices, floor and side-wall construction, and doors, etc.

2. Only car owners are permitted to make the general body repairs required to keep a car in the condition necessary to handle bulk grains, sacked products, or other types of lading requiring the use of a so-called Class A car. Cars which remain away from owners' rails for extended periods do not receive the kind of body maintenance required to restore them to Class A condition because handling lines are reluctant to spend the money required to make major maintenance expenditures on a car owned by another line.

[116] 3. When cars are on owner's line only 20 to 30 percent of the time, the owner has no revenue incentive to restore them to high quality condition for the reason that after one load, other lines receive all the benefits of the rehabilitation expenditures made. The car owner often makes only such repairs as are needed to enable cars to be loaded off line and again earn per diem, since the provable earning capacity of a car which may be freely used by other carriers, is necessarily limited to per diem credits.

4. Ownership of cars by predominately originating carriers is discouraged when Car Service Rules are violated to the extent that cars remain off line for extended time periods for the reason that no reasonable estimates of car earnings can be made based on car utilization by the owner and the consequent freight revenues produced are uncertain.

5. Railroads which are fortunately situated in areas where car surpluses can and do develop can safely ignore peak loading requirements in car purchase programs, since they can always reload cars owned by others even though such loading takes cars farther from the owners and deprives both the car owner and its patron of the use of cars purchased to protect their mutual traffic.

[117] Although the carriers have written a well-conceived and clear set of Car Service Rules fully establishing the responsibility of each carrier for the proper loading of cars to insure the owner's receiving their full use while at the same time minimizing the empty car miles required to accomplish this, [the exhibits show conclusively that] the railroads ignore the rules more often than they comply with them. The inevitable result has been to burden the patrons of lines with an adequate ownership of cars with the deficiencies in car ownership of other carriers; to discourage the continued maintenance of a large fleet of general purpose cars and to discourage the maintenance of the existing fleet to high standards.

> In Docket 29669, (266 I.C.C. 687) the Commission said, on page 690, "When the supply of freight cars is sufficient to meet current demands, approximately 85 percent of the units unloaded at points not situated on the owning road are handled in accordance with the Car Service Rules, and compliance with the rules to this extent enables the carriers to maintain their equipment and meet the requirements of the shipping public."

Based on this belief, as well as on other evidence and findings, the Commission in 1947 required the carriers to file their Car Service Rules but did not order their observance by the carriers. In this report the Commission also found that the railroads' Car Service Rules were not unlawful, and that the railroads as a group had failed to furnish

adequate car service, to the detriment of the shipping public. [118] Witness Kline's various exhibits have shown that the railroads again are not furnishing adequate car service and that major shortages of freight cars, especially of the general service box car, are occurring with regularity.

Exhibits 24 through 28 have shown that, far from an 85% observance of car service rules, the carriers are loading cars towards owners only about 50% of the time and that some lines are guilty of misloading of cars as much as 90% of the time.

The Car Service Staff of the Bureau of Railroad Safety and Service is of the opinion that enforcement of the proposed Car Service Rules will more equitably distribute the existing fleet of cars and will achieve reasonable prompt return of freight cars to owners for use in serving their own patrons. Strict enforcement of these proposed Car Service Rules will, by the very nature of the rules themselves place the burden of ownership deficiencies, or unsatisfactory maintenance levels, exclusively on those carriers whose car fleets are inadequate to transport the traffic offered to them for origination, and will enable all carriers to more intelligently evaluate their ownership needs and to correct them.

It is therefore recommended that Car Service Rules 1, 2, 3, and 4, reproduced in Appendix A of my proposal be made mandatory on the carriers. The reference in proposed Car Service Rule 3 to Special Car Order No. 90 of the Association of American Railroads should be optional with the carriers.

ICC Docket No. *EX PARTE NO. 241*
Exhibit No. 24
Witness: C. C. Robinson

This exhibit, comprising six pages, is a summary of 58 reports of Safety and Service Agents of the Interstate Commerce Commission of railroad compliance with the Code of Car Service Rules of the Association of American Railroads.

SUMMARY OF REPORTS OF DEGREE COMPLIANCE WITH
SERVICE RULES OF ASSOCIATION OF AMERICAN

Railroad and Location	Period of Check	Car Service Rules Compliance					Initial
		Total Cars Checked	Compliance Cars	%	Violation Cars	%	
AGnP Atlanta, Ga.	10/15-10/20/65	21	3	14.3	18	85.7	C&O Sou B&O
ACL Atlanta, Ga.	10/15-10/20/65	51	12	23.5	39	76.5	PRR SSW SP
ATSF Fullerton, Calif.	10/25-11/2/65	83	62	74.7	21	25.3	LN PRR Wab
ATSF Borger, Tex.	10/14-10/20/65	46	26	56.5	20	43.5	CBQ SP MKT
ATSF Chicago, Ill.	10/22/65	51	34	66.7	17	33.3	B&R SAL Bdg
AHB Barberton, Ohio	June, 1965	560	182	32.5	378	67.5	Mlw IC UP
B&O Hagerstown, Md.	10/4-10/18/65	15	5	33.3	10	66.7	DTI KP SPS
B&O Fairmont, W. Va.	10/11-10/19/65	105	48	45.7	57	54.3	LN BP BR
B&M Boston, Mass.	10/15-10/18/65	56	44	78.6	12	21.4	SA IC Mlw
Canton Baltimore, Md.	10/14-10/26/65	93	64	68.8	29	31.2	SAL UP SP
TOTAL		1021	430		601		

SUMMARY OF REPORTS OF DEGREE COMPLIANCE WITH CODE OF CAR SERVICE RULES OF ASSOCIATION OF AMERICAN RAILROADS

Railroad and Location	Period of Check	Car Service Rules Compliance					Examples				
		Total Cars Checked	Compliance Cars	%	Violation Cars	%	Initial	Number	Date Billed	Destination	Route
AB&P Atlanta, Ga.	10/15-10/28/65	21	3	14.3	18	85.7	C&O	29235	10/15/65	Santa Clara, Calif.	AB&P-W of A-L&N-SP
							Sou	30137	10/18	Pascagoula, Miss.	AB&P-W of A-L&N
							B&O	468015	10/22	Mobile, Ala.	AB&P-W of A-L&N
ACL Atlanta, Ga.	10/15-10/28/65	51	12	23.5	39	76.5	PRR	606024	10/22	Los Angeles, Calif.	ACL-L&N-SSW-SP-UP
							SSW	46322	10/15	Greensboro, N. C.	ACL-Sou
							SP	215670	10/16	Savannah, Ga.	ACL
ATSF Fullerton, Calif.	10/25-11/2/65	83	62	74.7	21	25.3	LN	98576	10/26	Seattle, Wash.	ATSF-NP-GN
							PRR	70574	10/27	Rhodes, Wash.	ATSF-SP-NP
							Wab	6397	10/30	Seattle, Wash.	ATSF-SP-NP
ATSF Borger, Tex.	10/14-10/20/65	46	26	56.5	20	43.5	CRW	68008	10/19	Trenton, N. J.	ATSF-IPW-Nyp-AGT-PRR
							SP	218090	10/15	S. Providence, R. I.	ATSF-KI-CRW-BN-KL-NH
							NKY	1163	10/14	Mansfield, Ohio	ATSF-KL
ATSF Chicago, Ill.	10/22/65	51	34	66.7	17	33.3	BAR	4242	10/22	Oakland, Calif.	ATSF
							SAL	21895	10/22	Kansas City, Kan.	ATSF
							Rdg	109161	10/22	Ft. Worth, Tex.	ATSF
AVS Barberton, Ohio	June, 1964	560	182	32.5	378	67.5	Milw	12666	6/1/64	Chelsea, Mass.	PRR-NYC
							IC	42778	6/11/64	Toronto, Ont.	KL-NYC-PRR-CP
							CP	51839	6/15/64	W. Norfolk, Va.	KL-C&O-N&W-NFD
B&O Hagerstown, Md.	10/4-10/18/65	15	5	33.3	10	66.7	DTI	13219	10/4/65	Springfield, Va.	B&O-Sou
							NP	4273	10/14	Alexandria, Va.	B&O-EPAP
							SPS	11433	10/16	Springfield, Va.	B&O-Sou
B&O Fairmont, W. Va.	10/11-10/19/65	105	48	45.7	57	54.3	LN	92404	10/11	Vineland, N. J.	B&O-WM-Rdg-PRR-CRJ
							SP	207059	10/14	Miami, Fla.	B&O-Sou-FEC
							NH	33114	10/16	Cincinnati, Ohio	B&O-PRR
B&M Boston, Mass.	10/15-10/18/65	56	44	78.6	12	21.4	SA	8444	10/15	Chicago, Ill.	BM-NYC
							IC	36244	10/16	Los Angeles, Calif.	BM-IC-KL-ATSF
							Pilw	30435	10/18	Augusta, Me.	BM-MeC
Canton Baltimore, Md.	10/14-10/26/65	93	64	68.8	29	31.2	SAL	27091	10/14	Hamilton, Ohio	Ctn-B&O
							UP	164185	10/20	Philadelphia, Pa.	Ctn-PRR
							SP	108857	10/14	Worcester, Mass.	Ctn-PRR-B&M-NYC
TOTAL		1021	490		601						

SUMMARY OF REPORTS OF DEGREE COMPLIANCE WITH CODE OF CAR

SERVICE RULES OF ASSOCIATION OF AMERICAN RAILROADS

Exhibit No. 24
Page 2

Railroad and Location	Period of Check	Car Service Rules Compliance: Total Cars Checked	Compliance	%	Violation Cars	%	Examples: Initial	Number	Date Billed	Destination	Route
C&NW	10/12-10/26/65	39	18	46.2	21	53.8	GN	[illegible]	10/18	Detroit, Mich.	[illegible]
Eau Claire, Wis.							SAL	177[illegible]41	10/20	Minneapolis, Minn.	CNW
							B&M	77[illegible]8	10/18	Jacksonville, Fla.	CNW-C&O-SAL
C&NW	10/11-10/22/65	38	27	71.0	11	29.0	GN	[illegible]	10/22	Chicago, Ill.	CNW
Butler, Wis.							GTW	51[illegible]775	10/15	Memphis, Tenn.	CNW-Mon-LN
							NTC	7[illegible]03	10/[illegible]	Edmonds, Wash.	CNW-[illegible]
CBQ	10/11-10/13/65	60	39	65.0	21	35.0	Rdg	[illegible]	10/11	Minneapolis, Minn.	CBQ-[illegible]
N. Kansas City, Mo.							UP	[illegible]	10/12	New Albany, Ind.	CBQ-Mon
							Milw	17[illegible]	10/12	Lancaster, Pa.	CBQ-PLS
CBQ	10/20-11/1/65	88	35	39.8	53	60.2	B&O	470624	10/22	Dallas, Tex.	CBQ-[illegible]-TP
Lincoln, Neb.							SP	173[illegible]7	10/27	Garwin, Ia.	CBQ-CNW
							[illegible]	21[illegible]16	10/29	Green Bay, Wis.	CBQ-CNW
COW	10/11-10/27/65	33	12	36.4	21	63.6	SLSF	[illegible]	10/12	Willmar, N. D.	[illegible]
Ft. Dodge, Ia.							LN	9[illegible]365	10/14	Pine City, Minn.	[illegible]
							PRR	60[illegible]3	10/26	Melville, N. D.	[illegible]
CRI&P	10/8-10/21/65	25	8	30.8	18	69.2	UP	126[illegible]	10/13	Saginaw, Mich.	RI-[illegible]
Newton, Ia.							C&O	1[illegible]6	10/14	Portland, Ore.	RI-UP
							NP	8[illegible]6	10/14	Forest Park, Ga.	RI-SLSF-COa
CMStP&P	10/25-11/2/65	18	7	38.9	11	61.7	SP	[illegible]	11/2	Indianapolis, Ind.	Milw-[illegible]
St. Paul, Minn.							CBQ	47363	10/29	Albany, Ga.	Milw-[illegible]
							Soo	76126	10/23	Little Falls, N. Y.	Milw-[illegible]
CMStP&P	10/[illegible]/27/65	30	16	53.3	14	46.7	PRR	82[illegible]0	10/18	Brownsville, Tex.	Milw-[illegible]
Eau Claire, Wis.							SP	21[illegible]59	10/20	Philadelphia, Pa.	Milw-[illegible]
							CBQ	47221	10/27	Houston, Tex.	Milw-[illegible]
CRI&P	10/20-10/25/65	21	2	9.5	19	90.5	PRR	24353	10/20	Beaumont, Tex.	RI-[illegible]
Enid, Okla.							NP	4[illegible]5	10/21	Houston, Tex.	RI
							UP	126[illegible]	10/25	Corpus Christi, Tex.	RI-UP
EL	10/1[illegible]-11/3/65	37	25	67.6	12	32.4	UP	110[illegible]	10/19	Newark, N. J.	[illegible]
Hubbard, Ohio							SLSF	[illegible]	11/1	E. Syracuse, N. Y.	EL
							GN	12[illegible]	11/2	New York, N. Y.	[illegible]
TOTAL		390	189		201						

SUMMARY OF REPORTS OF DEGREE COMPLIANCE WITH CODE OF CAR SERVICE RULES OF ASSOCIATION OF AMERICAN RAILROADS

Railroad and Location	Period of Check	Car Service Rules Compliance: Total Cars Checked	Compliance Cars	%	Violation Cars	%	Example: Initial	Number	Date Billed	Destination	Route
FIDMS Ft. Dodge, Ia.	10/11-10/25/65	114	48	42.1	66	57.9	Milw	12932	10/26	Oakland, Calif.	FIDMS-CBQ-DENM-WP
							SP	215394	10/26	St. Paul, Minn.	FIDMS-CMP
							NYC	72183	10/26	Long Beach, Calif.	FIDMS-CGA-ATSF
Georgia RR Atlanta, Ga.	10/15-10/28/65	18	8	44.4	10	55.6	UP	175202	10/16	Augusta, Ga.	Ga
							MP	81169	10/26	Hartsville, S. C.	Ga-ACL
							CBQ	41943	10/26	Winston-Salem, N. C.	Ga-ACL-WSS
GM&O Alton, Ill.	10/4-10/13/65	45	27	60.0	18	40.0	BAR	6127	10/4	Humboldt, Tenn.	GMO
							MP	8492	10/5	Huntington, W. Va.	GMO-CAO
							Wab	91301	10/9	Miami, Fla.	GMO-SAL
MKT Houston, Tex.	10/20-10/22/65	77	39	50.6	38	49.4	SSW	35272	10/20	Greenville, S. C.	MKT-MP-LN-SAL
							ACL	32122	10/20	Holtville, Calif.	SP
							CGA	550	10/21	Granite City, Ill.	MP-TRRA
IC Mayfield, Ky.	10/11-10/11/65	44	30	68.2	14	31.8	GM	12140	10/11	Tupelo, Miss.	IC-SLSF
							SP	217727	10/12	Victor, N. Y.	IC-NYC
							GM	4140	10/14	Worcester, Mass.	IC-CAO-KCM-MO-Rdg-CNJ
IC Ft. Dodge, Ia.	10/11-10/26/65	46	17	37.0	29	63.0	NYC	73102	10/15	Los Angeles, Calif.	IC-UP
							SP	215677	10/16	Milwaukee, Wis.	IC-Milw
							Rdg	109345	10/15	Brunswick, Ga.	IC-Sou
ITC Decatur, Ill.	10/11-10/22/65	24	8	33.3	16	66.7	Sou	86557	10/11	Laredo, Tex.	ITC-MP
							NYC	176566	10/18	Laredo, Tex.	ITC-MP
							BN	77097	10/20	Laredo, Tex.	ITC-MP
MKT Kansas City, Mo.	10/11-10/20/65	31	21	67.7	10	32.3	CAO	122627	10/18	Houston, Tex.	MKT
							BN	77294	10/11	Denver, Colo.	CBQ
							Rdg	108439	10/11	Minneapolis, Minn.	CBQ
LAA Springhill, La.	10/9-10/11/65	46	31	67.4	15	32.6	NYC	45312	10/11	Carrollton, Tex.	LAA-MKT
							MKT	2874	10/11	Cleveland, Ohio	LAA-MP-Nkp.
							MP	36096	10/9	Mobile, Ala.	LAA-LAN
LAN Memphis, Tenn.	10/12-10/22/65	121	82	67.8	39	32.2	SAL	27121	10/20	Chicago, Ill.	LAN-CIM-Milw
							CGa	6457	10/18	Louisville, Ky.	LAN
							BAR	4437	10/14	Dalton, Ga.	LAN
TOTAL		566	311		255						

SUMMARY OF REPORTS OF DEGREE COMPLIANCE WITH CODE OF CAR

SERVICE RULES OF ASSOCIATION OF AMERICAN RAILROADS

Railroad and Location	Period of Check	Car Service Rules Compliance: Total Cars Checked	Compliance Cars	%	Violation Cars	%	Examples: Initial	Number	Date Billed	Destination	Route
LAN	10/15-10/28/65	13	6	46.2	7	53.8	NP	3921	10/21	Wallingford, Conn.	LN-EL-NH
Atlanta, Ga.							SP	210988	10/15	Miami, Fla.	LN-ACL-FEC
							IC	137448	10/25	Milledgeville, Ga.	LN-Ga
LV	10/12-10/26/65	41	24	58.5	17	41.5	NYC	41759	10/13	Los Angeles, Calif.	LV-[illegible]-SP
Easton, Pa.							SLSF	18286	10/25	Brattleboro, Vt.	LV-[illegible]
							ACL	30157	10/22	Ashland, Wis.	LV-[illegible]
MKT	10/18-10/2[illegible]	38	26	63.4	12	31.6	ATSF	13504	10/18	Atlanta, Ga.	MKT-TP-MP-SLSF-[illegible]
Dallas, Tex.							NP	36[illegible]1	10/18	Jacksonville, Ill.	[illegible]
							CMO	50000	10/19	Pryor, Okla.	MKT
MP	10/25-11/1/65	37	26	70.3	11	29.8	ATSF	20[illegible]64	10/26	Brooklyn, N. Y.	MP-SP-[illegible]
Corpus Christi, Tex,							NYC	71202	10/27	Tacoma, Wash.	MP-[illegible]-CBQ-NP
							CAO	17087	10/29	San Francisco, Calif.	MP-TP-SP-WP
MP	10/18-10/26/65	27	15	55.6	12	44.4	SP	217088	10/19	Ensley, Ala.	MP-Sou-[illegible]
San Antonio, Tex.							IC	41761	10/19	San Francisco, Calif.	MP-[illegible]
							CSW	3[illegible]01	10/19	Corpus Christi, Tex.	MP
NYC	10/27-10/29/65	28	14	50.0	14	50.0	CBQ	2[illegible]10	10/27	Decatur, Ga.	NYC-PRR-RFP-ACL
Utica, N. Y.							SAL	2[illegible]30	10/27	Chicago, Ill.	NYC
							NP	6634	10/29	N. Stratford, N. H.	NYC-[illegible]-MoC
NYC	10/11-12-10/21/65	49	3	6.1	46	93.9	SAL	10093	10/21	Chicago, Calif.	NYC-[illegible]-SP
Moraine, Ohio							NP	8[illegible]1	10/12	Tampa, Fla.	NYC-CAO-CRR-ACL
							IC	13[illegible]16	10/11	E. Hartford, Conn.	NYC-NH
NYC	10/4-10/13/65	36	12	33.3	24	66.7	GN	12975	10/12	Princeton, W. Va.	NYC-[illegible]
Painesville, Ohio							Sou	26025	10/11	Adams, Mass.	NYC
							IC	132173	10/8	Bogota, N. J.	NYC
NYC	10/4-10/12/65	55	20	36.4	35	63.6	ACL	30184	10/12	Toronto, Ont.	NYC-[illegible]
Belle, W. Va.							GN	3[illegible]43	10/11	Ampthill, Va.	[illegible]-SAL
							SLSF	[illegible]43	10/6	S. Providence, R. I.	[illegible]
[illegible]	May, 196[illegible]	28[illegible]	123	42.7	165	57.[illegible]	[illegible]	[illegible]98	5/11/64	[illegible], Calif.	[illegible]
Cleveland, Ohio							ATSF	27[illegible]13	5/20	Decatur, Ala.	NYC [illegible]
							GN	5[illegible]129	5/28	Los Angeles, Calif.	NYC-ATSF
							IC	42868	5/6	New York, N. Y.	[illegible]
TOTAL		612	269		343						

SUMMARY OF REPORTS OF DEGREE COMPLIANCE WITH CODE OF CAR

SERVICE RULES OF ASSOCIATION OF AMERICAN RAILROADS

Railroad and Location	Period of Check	Car Service Rules Compliance: Total Cars Checked	Compliance Cars	%	Violation Cars	%	Examples: Initial	Number	Date Billed	Destination	Route
NYNH&H	10/14-10/18/65	64	48	75.0	16	25.0	Rdg	19674	10/15	Chicago, Ill.	NH-EL
Boston, Mass.							NYC	178018	10/15	Los Angeles, Calif.	NH-EL-ATSF
							SAL	24140	10/15	Chicago, Ill.	NH-EL
Niagara Jct.	10/7-10/13/65	82	40	48.8	42	51.2	MP	81017	10/7	Philadelphia, Pa.	N.J.-NYC-PRR
Niagara Falls, N. Y.							Milw	30476	10/12	Sunbury, Pa.	N.J.-NYC-PRR
							SP	214605	10/13	E. Hartford, Conn.	N.J.-NYC-NH
N&W	10/6-10/12/65	127	81	63.8	46	36.2	B&O	370073	10/6	Houston, Tex.	N&W-SSW-SP
St. Louis, Mo.							SAL	24633	10/8	Cheyenne, Wyo.	N&W-UP
							MP	8052	10/14	Houston, Tex.	N&W-SSW-SP
PRR	11/1-11/4/65	40	25	62.5	15	37.5	MP	36877	11/1	Brockport, N. Y.	PRR
Baltimore, Md.							LN	99458	11/3	Green Bay, Wis.	PRR-CNW
							BM	76323	11/4	Toledo, Ohio	PRR-C&O
PRR	10/4-10/22/65	54	28	51.8	26	48.2	NYC	46849	10/7	N. Platte, Neb.	PRR-CBQ-UP
Warren, Ohio							MP	89255	10/15	New Brunswick, N. J.	PRR
							UP	110425	10/22	High Point, N. C.	PRR-NW-WSS-NPTD
SLSF	10/18-10/26/65	20	4	20.0	16	80.0	MP	37053	10/19	Memphis, Tenn.	SLSF
Arkansas City, Kan.							C&O	21972	10/21	Houston, Tex.	SLSF-MP
							CGe	5624	10/22	Houston, Tex.	SLSF-MP
Sou	10/20-11/4/65	20	9	45.0	11	55.0	SAL	24404	10/21	West Lake, La.	Sou,MP,KCS
Wilton, Ala.							ACY	3564	10/29	Tampa, Fla.	Sou-SAL
							PRR	70624	10/27	Donalsonville, Ga.	Sou-W of A-ACL
Sou. Ind.	10/25-11/8/65	72	37	51.4	35	48.6	CBQ	9012	10/27	Greenville, N. C.	S.I.-B&O-Sou
Speed, Ind.							CBQ	41011	10/28	Bennettville, N. C.	S.I.-B&O-C&O-CBQ-ACL-CNL-ACL
							MP	85413	10/29	Parkersburg, W. Va.	S.I.-B&O
S.P.	10/10-11/4/65	223	124	55.6	99	44.4	GN	36326	10/18	Omaha, Neb.	SP-MP-DSSW-UP
Mulford, Calif.							C&O	21896	10/27	Seattle, Wash.	SP-MP
							NYC	72675	10/30	Spokane, Wash.	SP-UP
SP	10/25-11/2/65	41	34	82.9	7	17.1	CNW	24369	10/27	Yakima, Wash.	SP-MP
Corvallis, Ore.							UP	150196	10/29	Braintree, Mass.	SP-DSSW-MP-KNW-EL-NH
							LN	97718	10/30	Henrietta, N. Y.	SP-DSSW-MP-CNW-GTW-CB-LV
TOTAL		743	430		313						

Exhibit No. 24
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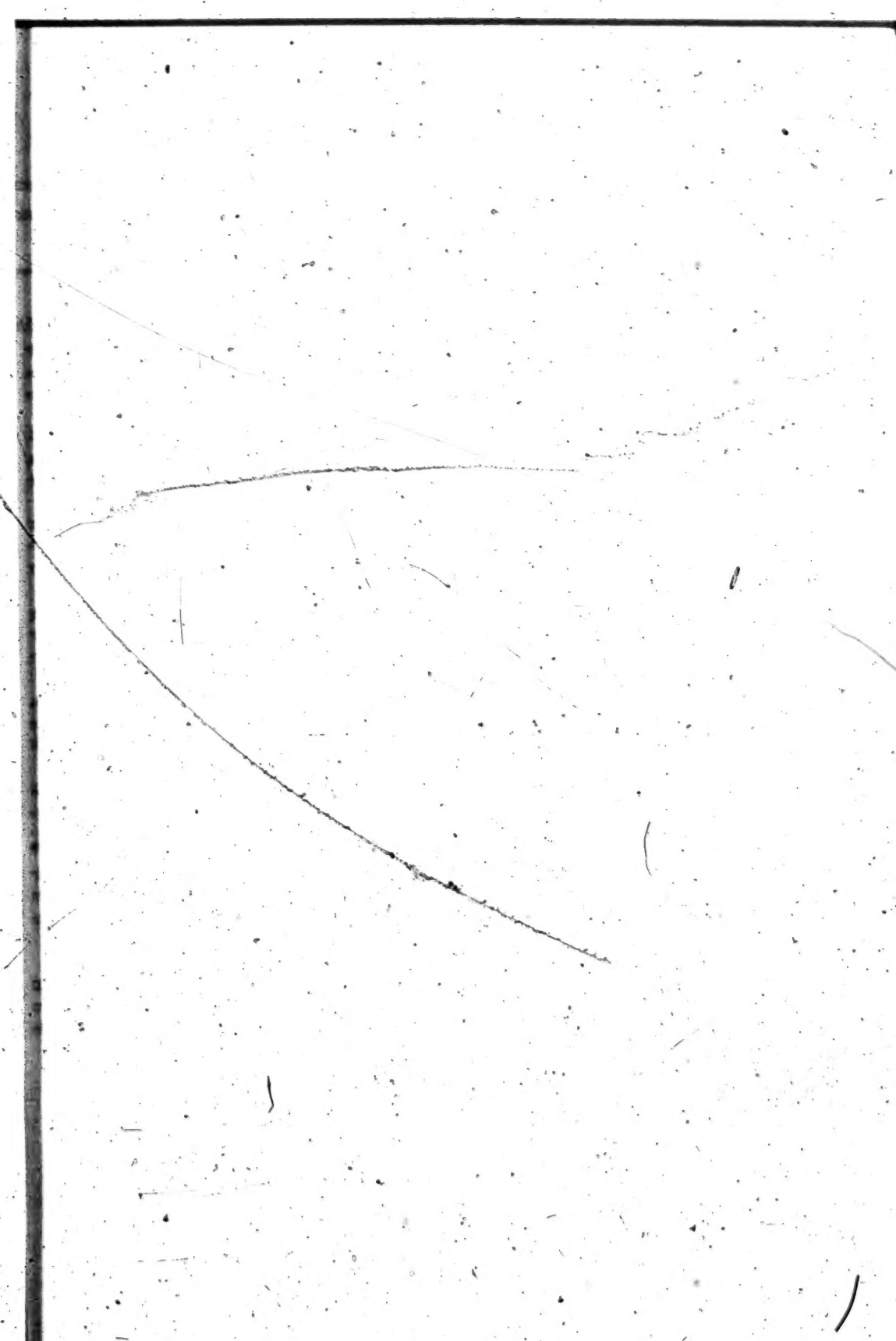
SUMMARY OF REPORTS OF DEGREE COMPLIANCE WITH CODE OF CAR SERVICE RULES OF ASSOCIATION OF AMERICAN RAILROADS

Railroad and Location	Period of Check	Car Service Rules Compliance: Total Cars Checked	Compliance Cars	%	Violation Cars	%
SP San Antonio, Tex.	10/18-10/22/65	46	36	78.3	10	21.7
SP Various-Tucson Division	10/4-10/28/65	100	78	78.0	22	22.0
TRRA St. Louis, Mo.	10/6-10/19/65	14	2	14.3	12	85.7
UP Omaha, Neb.	10/18-11/1/65	66	36	54.5	30	45.5
UP Kansas City, Kan.	10/22-10/26/65	73	56	76.7	17	23.3
WM Hagerstown, Md.	10/4-10/18/65	20	12	60.0	8	40.0
SP San Leandro, Calif.	10/4-10/13/65	19	4	21.1	15	78.9
SP San Francisco, Calif.	10/7-10/12/65	33	23	69.7	10	30.3
TOTALS		371	247		124	
Recapitulation Totals Sheet 1		1081	480		601	
2		390	189		201	
3		566	311		255	
4		612	269		343	
5		743	430		313	
6		371	247		124	
GRAND TOTAL		3763	1926	51.2	1837	49.8

Examples: Initial	Number	Date Billed	Destination	Route
WP	35513	10/20	Johnsville, Miss.	SP-IC-NSC.
Sou	36672	10/22	El Paso, Tex.	SP
Mlw	29077	10/[illegible]	Miami, Fla.	SP-SAL-ACL-FEC
ACL	53403	10/[illegible]	San Diego, Calif.	SP-SAL
GTW	59627	10/[illegible]	Spokane, Wash.	SP-NP
NP	3118	10/21	Houston, Tex.	SP
IC	33712	10/13	Harrisburg, Pa.	TRRA-PRR
SP	215031	10/15	Carthage, N. Y.	TRRA-PRR
ACY	3593	10/18	Cleburne, Tex.	TRRA-KCS-ATSF
Rdg	108301	10/22	Paris, Tex.	UP-MKT
AMP	37757	10/27	Redlands, Calif.	UP-ATSF
SP	176217	10/27	Camp Wadsworth, S. C.	UP-MKT-[illegible]
Sou	38145	10/22	Orchurst, Okla.	UP-ATSF
LN	6123	10/24	Great Lakes, Ill.	UP-ATSF
CNW	68976	10/23	New Orleans, La.	UP-MKT-LN
LN	8935	10/4	San Francisco, Calif.	WM-PRR-Ala-LN-SP
Sou	22106	10/14	Perth Amboy, N. J.	WM-B&O-CNJ
Wab	21324	10/5	Baldwin, Miss.	WM-B&O-CTJ-IC-GM
NP	31191	10/6	Los Angeles, Calif.	SP
PRR	60509	10/6	Seattle, Wash.	SP-UP
UP	164646	10/8	Garland, Tex.	SP-ATSF
IC	41236	10/7	Trenton, N. J.	SP-RDG-Pa
NYC	49187	10/7	Oakland, Calif.	SP
NP	82116	10/8	Petaluma, Calif.	SP-NWP

SOURCE: Various reports of Safety and Service Agents of the Interstate Commerce Commission.



ICC DOCKET NO. EX PARTE NO. 241

EXHIBIT NO. 27 (2 PAGES)

WITNESS: C. C. ROBINSON

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PERCENTAGE OF BOX CARS OWNED BY U.S. CLASS I RAILROADS LOCATED ON OWNER'S LINES

(HOME BOX CARS ON HOME ROADS)

	1947*			1948*			1949*			1950*			1951*			1952*			1953*			1954*			1955*		
	XM	XAP	ALL	XM	XAP	ALL	XM	XAP	ALL	XM	XAP	ALL	XM	XAP	ALL	XM	XAP	ALL	XM	XAP	ALL	XM	XAP	ALL	XM	XAP	ALL
Jan. 1	15.3	39.4	17.0	17.9	43.5	19.6	32.7	50.4	33.9	38.0	52.8	39.0	19.7	41.5	21.6	29.0	54.3	30.9	33.5	54.0	35.0	44.1	59.0	45.2	40.1	57.2	41.3
15	15.5	46.0	17.4	19.1	42.2	20.6	35.3	50.3	36.4	40.1	51.9	41.0	20.0	44.6	21.9	30.8	53.2	32.4	36.3	55.2	37.6	43.7	58.3	44.7	41.8	57.2	42.9
Feb. 1	15.1	46.9	17.1	18.7	42.0	20.3	35.9	50.8	36.9	39.0	51.8	39.9	18.7	42.5	20.6	29.1	52.4	30.8	34.2	54.5	35.6	42.1	54.8	43.0	39.7	58.2	41.0
15	15.3	44.9	17.1	19.2	42.1	20.7	37.1	52.1	38.1	37.4	53.0	38.5	17.9	41.6	19.8	28.6	51.2	30.2	32.3	52.9	33.7	40.9	54.8	41.9	37.5	56.7	38.9
March 1	14.6	43.8	16.4	18.8	41.2	20.3	37.3	50.0	38.2	34.9	51.0	36.1	17.2	40.6	19.1	28.1	50.8	29.8	31.7	50.6	33.0	40.1	54.1	41.2	35.8	57.2	37.3
15	14.5	43.1	16.3	19.5	43.7	21.1	37.5	54.5	38.7	32.9	49.5	34.1	16.9	41.9	18.8	28.1	49.6	29.7	31.2	52.2	32.7	40.2	55.1	41.3	34.3	55.8	35.8
April 1	14.3	43.3	16.1	21.6	48.3	23.4	39.2	56.6	40.4	30.6	49.2	32.0	17.3	39.0	19.0	28.2	48.9	29.7	30.5	50.6	31.9	41.1	55.3	42.8	33.1	54.4	34.7
15	14.3	43.6	16.1	23.7	51.2	25.6	42.3	59.1	43.5	31.0	49.0	32.3	17.6	41.0	19.5	30.4	52.2	31.9	31.5	52.1	32.9	41.9	55.9	43.0	33.4	52.6	34.8
May 1	15.4	47.9	17.5	26.3	55.2	28.3	43.5	56.0	44.3	31.5	50.9	32.9	18.6	41.2	20.3	32.3	52.4	33.7	31.9	51.5	33.3	41.8	56.6	42.9	32.2	52.5	33.7
15	16.3	51.7	18.6	27.1	53.5	28.9	43.3	59.2	44.4	31.1	49.1	32.5	21.2	44.6	23.0	34.4	51.3	35.5	33.2	51.8	34.5	41.0	58.1	42.3	31.9	53.2	33.4
June 1	18.1	54.1	20.5	29.2	52.8	30.8	42.8	59.2	44.0	30.0	48.1	31.4	25.2	46.5	26.9	36.6	52.3	32.6	33.8	53.9	35.3	40.1	58.5	41.4	30.4	54.0	32.1
15	18.5	53.4	20.7	29.6	52.0	31.1	43.1	58.1	44.1	29.6	47.0	31.0	27.2	48.5	28.8	38.6	54.1	39.7	32.9	52.0	34.3	40.4	61.2	41.9	30.4	56.9	32.3
July 1	18.6	52.7	20.9	28.8	52.2	30.3	41.3	53.6	42.1	26.8	44.3	28.2	28.3	47.9	29.8	37.4	54.7	38.6	32.1	51.5	33.5	39.2	60.4	40.8	28.5	54.1	30.4
15	18.5	51.8	20.7	28.2	49.1	29.6	40.6	56.7	41.7	26.3	46.2	27.9	29.0	49.5	30.6	36.8	58.5	38.3	32.5	53.4	34.0	38.8	61.7	40.4	28.1	53.1	29.9
Aug. 1	18.1	50.5	20.2	26.7	46.5	28.1	37.9	54.3	39.1	23.6	43.8	25.1	27.2	49.4	28.9	35.6	59.2	37.2	31.5	53.9	33.1	37.3	60.1	38.9	26.4	54.6	28.5
15	17.9	50.0	20.0	26.1	48.1	27.6	38.1	54.1	39.3	22.5	43.0	24.1	25.7	48.5	27.5	34.4	55.1	35.9	31.6	54.7	33.2	37.8	60.9	39.4	26.2	55.7	28.4
Sept. 1	17.3	48.3	19.4	25.6	48.2	27.1	37.4	50.4	38.3	21.4	42.7	23.0	25.9	48.1	27.6	32.4	53.0	33.8	30.8	52.9	32.4	37.0	62.1	38.9	26.7	54.3	28.7
15	17.4	45.5	19.3	25.5	47.6	27.0	35.2	49.1	36.2	21.5	43.6	23.2	25.8	48.7	27.6	31.0	53.0	32.5	30.4	54.3	32.1	36.9	62.9	38.8	26.7	56.0	28.8
Oct. 1	16.7	43.1	18.5	24.2	46.6	25.7	31.3	46.2	32.3	21.3	44.8	23.1	24.8	49.2	26.6	28.2	49.6	29.7	28.8	54.4	30.6	35.0	63.3	37.1	25.1	55.7	27.4
15	16.9	45.1	18.7	22.8	44.4	24.3	29.8	45.4	30.9	21.3	46.1	23.2	24.4	51.1	26.4	26.2	50.9	27.9	28.3	54.1	30.1	33.6	64.2	35.8	24.4	56.0	26.7
Nov. 1	16.3	44.9	18.2	21.7	42.8	23.1	30.4	46.7	31.5	20.9	44.6	22.8	23.6	46.1	25.3	25.2	50.1	26.9	28.5	54.0	30.4	32.7	63.3	34.9	23.4	54.4	25.6
15	16.3	42.5	18.0	21.2	42.9	22.6	30.7	50.0	32.0	21.5	45.5	23.4	23.9	46.0	25.5	25.4	50.2	27.1	29.4	56.7	31.4	32.4	61.0	34.5	23.6	51.9	25.7
Dec. 1	16.3	42.1	18.0	22.9	45.3	24.4	31.5	56.7	33.3	21.2	44.2	23.0	24.5	52.1	26.5	25.7	51.0	27.4	33.0	56.9	34.7	33.0	60.3	35.0	24.0	50.6	26.0
15	16.6	41.2	18.2	25.4	46.6	26.8	32.8	58.3	34.6	20.5	44.9	22.4	25.5	52.8	27.6	28.3	52.7	29.2	37.0	56.3	38.4	34.8	57.9	36.5	25.8	51.6	27.7

Exhibit No. 27
Page 1

PERCENTAGE OF BOX CARS OWNED BY U.S. CLASS I RAILROADS LOCATED ON OWNER'S LINES

(HOME BOX CARS ON HOME ROADS)

1947*			1948*			1949*			1950*			1951*			1952*			1953*			1954*			1955*			1956*		
XM	XAP	ALL	XM	XAP	ALL	XM	XAP	ALL	XM	XAP	ALL	XM	XAP	ALL	XM	XAP	ALL	XM	XAP	ALL	XM	XAP	ALL	XM	XAP	ALL	XM	XAP	ALL
3	39.4	17.0	17.9	43.5	19.6	32.7	50.4	33.9	38.0	52.8	39.0	19.7	41.5	21.6	29.0	54.3	30.9	33.5	54.0	35.0	44.1	59.0	45.2	40.1	57.2	41.3	27.3	51.8	29.1
5	46.0	17.4	19.1	42.2	20.6	35.3	50.3	36.4	40.1	51.9	41.0	20.0	44.6	21.9	30.8	53.2	32.4	36.3	55.2	37.6	43.7	58.3	44.7	41.8	57.2	42.9	28.8	52.4	30.5
1	46.9	17.1	18.7	42.0	20.3	35.9	50.8	36.9	39.0	51.8	39.9	18.7	42.5	20.6	29.1	52.4	30.8	34.2	54.5	35.6	42.1	54.8	43.0	39.7	58.2	41.0	28.6	53.3	30.4
3	44.9	17.1	19.2	42.1	20.7	37.1	52.1	38.1	37.4	53.0	38.5	17.9	41.6	19.8	28.6	51.2	30.2	32.3	52.9	33.7	40.9	54.8	41.9	37.5	56.7	38.9	27.9	53.2	29.8
6	43.8	16.4	18.8	41.2	20.3	37.3	50.0	38.2	34.9	51.0	36.1	17.2	40.6	19.1	28.1	50.8	29.8	31.7	50.6	33.0	40.1	54.1	41.2	35.8	57.2	37.3	26.5	53.5	28.5
5	43.1	16.3	19.5	43.7	21.1	37.5	54.5	38.7	32.9	49.5	34.1	16.9	41.9	18.8	28.1	49.6	29.7	31.2	52.2	32.7	40.2	55.1	41.3	34.3	55.8	35.8	26.0	52.6	27.9
3	43.3	16.1	21.6	48.3	23.4	39.2	56.6	40.4	30.6	49.2	32.0	17.3	39.0	19.0	28.2	48.9	29.7	30.5	50.6	31.9	41.1	55.3	42.8	33.1	54.4	34.7	25.1	52.6	27.1
3	43.6	16.1	23.7	51.2	25.6	42.3	59.1	43.5	31.0	49.0	32.3	17.6	41.0	19.5	30.4	52.2	31.9	31.5	52.1	32.9	41.9	55.9	43.0	33.4	52.6	34.8	25.4	53.8	27.5
4	47.9	17.5	26.3	55.2	28.3	43.5	56.0	44.3	31.5	50.9	32.9	18.6	41.2	20.3	32.3	52.4	33.7	31.9	51.5	33.3	41.8	56.6	42.9	32.2	52.5	33.7	25.3	56.3	27.5
3	51.7	18.6	27.1	53.5	28.9	43.3	59.2	44.4	31.1	49.1	32.5	21.2	44.6	23.0	34.4	51.3	35.5	33.2	51.8	34.5	41.0	58.1	42.3	31.9	53.2	33.4	25.9	58.3	28.3
1	54.1	20.5	29.2	52.8	30.8	42.8	59.2	44.0	30.0	48.1	31.4	25.2	46.5	26.9	36.6	52.3	32.6	33.8	53.9	35.3	40.1	58.5	41.4	30.4	54.0	32.1	26.8	59.0	29.1
5	53.4	20.7	29.6	52.0	31.1	43.1	58.1	44.1	29.6	47.0	31.0	27.2	48.5	28.8	38.6	54.1	39.7	32.9	52.0	34.3	40.4	61.2	41.9	30.4	56.9	32.3	27.5	60.1	28.8
6	52.7	20.9	28.8	52.2	30.3	41.3	53.6	42.1	26.8	44.3	28.2	28.3	47.9	29.8	37.4	54.7	38.6	32.1	51.5	33.5	39.2	60.4	40.8	28.5	54.1	30.4	27.2	58.5	29.4
5	51.8	20.7	28.2	49.1	29.6	40.6	56.7	41.7	26.3	46.2	27.9	29.0	49.5	30.6	36.8	58.5	38.3	32.5	53.4	34.0	38.8	61.7	40.4	28.1	53.1	29.9	28.0	58.9	30.2
1	50.5	20.2	26.7	46.5	28.1	37.9	54.3	39.1	23.6	43.8	25.1	27.2	49.4	28.9	35.6	59.2	37.2	31.5	53.9	33.1	37.3	60.1	38.9	26.4	54.6	28.5	28.1	59.9	30.4
9	50.0	20.0	26.1	48.1	27.6	38.1	54.1	39.3	22.5	43.0	24.1	25.7	48.5	27.5	34.4	55.1	35.9	31.6	54.7	33.2	37.8	60.9	39.4	26.2	55.7	28.4	27.8	59.8	30.1
3	48.3	19.4	25.6	48.2	27.1	37.4	50.4	38.3	21.4	42.7	23.0	25.9	48.1	27.6	32.4	53.0	33.8	30.8	52.9	32.4	37.0	62.1	38.9	26.7	54.3	28.7	26.9	58.1	29.1
4	45.5	19.3	25.5	47.6	27.0	35.2	49.1	36.2	21.5	43.6	23.2	25.8	48.7	27.6	31.0	53.0	32.5	30.4	54.3	32.1	36.9	62.9	38.8	26.7	56.0	28.8	25.9	59.3	28.3
7	43.1	18.5	24.2	46.6	25.7	31.3	46.2	32.3	21.3	44.8	23.1	24.8	49.2	26.6	28.2	49.6	29.7	28.8	54.4	30.6	35.0	63.3	37.1	25.1	55.7	27.4	24.3	61.0	26.9
9	45.1	18.7	22.8	44.4	24.3	29.8	45.4	30.9	21.3	46.1	23.2	24.4	51.1	26.4	26.2	50.9	27.9	28.3	54.1	30.1	33.6	64.2	35.8	24.4	56.0	26.7	23.5	59.8	26.0
3	44.9	18.2	21.7	42.8	23.1	30.4	46.7	31.5	20.9	44.6	22.8	23.6	46.1	25.3	25.2	50.1	26.9	28.5	54.0	30.4	32.7	63.3	34.9	23.4	54.4	25.6	23.3	56.5	25.6
3	42.5	18.0	21.2	42.9	22.6	30.7	50.0	32.0	21.5	45.5	23.4	23.9	46.0	25.5	25.4	50.2	27.1	29.4	56.7	31.4	32.4	61.0	34.5	23.6	51.9	25.7	23.7	57.2	26.1
3	42.1	18.0	22.9	45.3	24.4	31.5	56.7	33.3	21.2	44.2	23.0	24.5	52.1	26.5	25.7	51.0	27.4	33.0	56.9	34.7	33.0	60.3	35.0	24.0	50.6	26.0	25.7	54.0	27.7
6	41.2	18.2	25.4	46.6	26.8	32.8	58.3	34.6	20.5	44.9	22.4	25.5	52.8	27.6	28.3	52.7	29.2	37.0	56.3	38.4	34.8	57.9	36.5	25.8	51.6	27.7	26.8	54.3	28.8

Exhibit No. 27
Page 2

PERCENTAGE OF BOX CARS[illegible] U.S. CLASS I ROADROADS LOCATED ON [illegible]

([illegible] BOX CARS ON HOME ROADS)

	1957* XM	XAP	ALL	1958* XM	XAP	ALL	1959* XM	XAP	ALL	1960* XM	XAP	ALL	1961* XM	XAP	ALL	1962* XM	XAP	ALL	1963+ XM	XAP	ALL	1964+ XM	XAP	ALL	1965+ XM	XAP	ALL
Jan. 1	29.7	55.3	31.5	48.2	63.4	49.2	44.7	58.4	45.7	43.9	52.4	44.6	47.6	52.3	48.0	40.5	53.6	41.6	42.1	49.2	42.7	38.2	44.4	38.9	35.9	43.7	37.3
15	31.7	54.9	33.4	50.0	62.5	50.8	46.1	57.2	46.8	45.4	50.4	45.8							44.2	48.9	44.7	38.2	44.7	39.0	36.9	43.9	37.9
Feb. 1	30.6	55.4	32.3	48.1	62.5	49.1	43.7	56.6	44.5	42.8	47.6	43.1	46.7	51.9	47.1	38.4	52.2	39.5	41.9	48.3	42.5	35.5	41.7	36.2	35.0	42.3	36.1
15	30.6	51.7	32.1	48.1	63.2	49.1	42.6	56.1	43.5	41.9	46.4	42.2							39.0	48.9	39.9	34.8	42.8	35.7	34.1	43.1	35.1
March 1	30.1	52.0	31.6	47.3	63.0	48.4	41.4	55.0	42.2	41.9	47.2	42.3	43.2	51.8	43.9	35.5	51.2	36.8	36.6	47.6	37.6	35.0	40.8	35.8	33.3	42.5	34.7
15	30.1	54.6	31.9	47.7	63.5	48.8	40.1	54.6	41.0	41.1	48.2	41.6							35.5	48.1	36.7	35.6	41.3	36.3	32.2	33.5	32.3
April 1	29.1	57.4	31.1	48.9	63.1	49.9	39.7	55.1	40.7	39.8	49.3	40.5	44.2	53.8	44.9	36.1	52.6	37.4	35.7	48.2	36.9	37.1	41.3	37.6	32.1	42.7	33.7
15	30.4	58.7	32.4	50.1	63.4	51.1	39.2	56.9	40.4	39.8	50.6	40.6							36.7	46.1	37.6	39.3	41.8	39.6	32.4	43.3	34.1
May 1	32.7	59.0	34.6	50.0	62.8	50.9	39.3	54.7	40.3	40.3	49.0	40.9	46.1	51.6	46.6	38.1	49.8	39.2	36.8	45.5	37.7	38.8	40.6	39.1	33.4	43.0	34.9
15	33.6	61.5	35.6	50.6	62.2	51.4	38.8	56.5	40.0	40.4	50.9	41.1							37.2	45.9	38.0	40.4	41.4	40.5	34.4	44.1	35.9
June 1	35.0	60.8	36.8	50.3	63.7	51.3	38.8	54.3	39.9	42.1	51.2	42.8	44.1	52.3	44.8	39.8	50.5	40.8	39.8	49.4	40.8	41.4	40.7	41.3	34.4	43.0	35.8
15	36.1	60.2	37.8	48.8	63.8	49.9	38.5	53.6	39.6	42.7	50.0	43.2							40.9	46.2	41.5	41.5	41.1	41.5	35.3	43.2	36.5
July 1	35.2	60.3	37.0	46.1	63.1	47.2	37.1	53.2	38.2	41.8	50.1	42.5	43.2	52.4	43.9	42.0	49.6	42.7	40.3	46.3	41.1	39.9	44.4	40.5	35.0	43.0	36.3
15	35.6	59.3	37.3	45.0	62.4	46.2	37.2	54.3	38.4	42.0	52.7	42.8							40.0	48.0	40.9	40.3	45.5	41.0	35.6	44.9	37.1
Aug. 1	33.8	59.9	35.7	42.5	61.8	43.8	39.4	54.4	40.4	39.6	52.7	40.6	40.6	53.5	41.7	41.5	50.4	42.3	38.8	48.0	39.8	41.0	43.5	41.4	35.1	43.4	36.5
15	32.5	58.9	34.4	39.5	62.5	41.1	40.7	54.7	41.7	38.9	53.0	40.9							39.0	49.2	40.1	41.1	43.9	41.5	36.9	37.7	37.0
Sept. 1	31.2	59.4	33.2	37.4	61.6	39.0	39.6	55.0	40.7	38.7	55.7	40.0	39.1	52.2	40.1	38.7	51.5	39.9	38.2	48.4	39.4	39.9	42.6	40.3	33.2	46.7	35.5
15	32.6	60.7	34.6	36.5	61.2	38.2	39.1	53.9	40.1	39.0	55.5	40.2							39.7	34.8	39.2	38.6	42.8	39.2	33.3	47.0	35.6
Oct. 1	32.0	62.9	34.2	35.0	62.6	36.8	36.2	51.7	37.3	37.5	45.1	38.1	38.9	53.1	40.0	36.7	48.2	37.8	36.9	47.2	38.1	35.7	41.0	36.4	32.7	44.6	34.8
15	31.6	63.5	33.9	33.6	60.1	35.4	36.0	49.0	36.9	37.0	46.3	37.7							34.9	45.7	36.1	33.6	41.8	34.7	31.2	44.7	33.6
Nov. 1	33.6	61.7	35.6	32.7	58.1	34.4	34.9	50.8	36.0	35.5	46.4	36.3	35.3	52.2	36.7	35.1	47.5	36.2	33.2	45.4	34.6	30.9	41.8	32.4	30.1	43.8	32.6
15	36.4	60.5	38.1	33.2	57.5	34.9	34.2	51.1	35.4	36.2	47.4	37.1							33.3	44.0	34.5	30.3	42.8	32.0	29.5	44.0	32.1
Dec. 1	40.3	58.5	41.6	37.1	55.9	38.4	35.6	51.7	36.7	37.9	49.6	38.8	38.5	54.2	39.8	35.3	47.4	36.4	33.8	44.3	35.0	30.2	41.7	31.8	29.2	42.2	31.6
15	41.9	58.1	43.0	40.3	56.5	41.4	37.9	52.0	38.9	42.3	51.0	43.0							36.1	44.7	37.1	31.5	33.7	31.7	29.9	44.3	32.5

Explanation XM - Box cars classed as XM, XME, XI, VA, VM, VS

XAP - Box cars classed as XAP, XAR, XML, XMP, XMR, XT

Sources: *AAR statement CS 61A

+AAR statement CS 8A

Mid-month figures for years 1961-1962 not distributed by Association of American Railroads

[3] *Gondola Cars*
All Class "G" types (except "GT" ore jennies)
(GBR, GBS, GSS, GBRS)
(All other "G" types)
Flat Cars
Plain Flats—FM (less than 151,000# capacity)
Piggyback flats (FC)
Multi-level flats (FA)
Other equipped flats—FM (151,000# capacity and over) FMS, FD, FG, FW
Data Requested in Appendices C & D

The respondents filed with the Commission data regarding car loading and car supply statistics for the study period October 1, 1964 to October 31, 1964.

Data Requested in Appendices E & F

Respondents filed with the Commission data regarding car-day and car-mile statistics for the study period October 1, 1964 to October 31, 1964.

Supplements

The respondents encountered problems of either interpretation or clarification of the Appendices in collecting the necessary data to complete Appendices C, D, E & F. It was stated in the general instructions, Appendix B, attached to the Commission's order issued July 29, 1964, that requests for interpretation or clarification were to be addressed to the Secretary, Interstate Commerce Commission, Washington, D.C.

Results of applying data to the formula to determine freight car requirements with the national interline car requirements allocated among Class I railroads on the basis of interline car days

[18] Exhibits No. 1 and 2 indicate a large deficiency of freight cars during the month of October, 1964. This deficiency was neither confined to a particular section of the United States nor confined to a particular type of freight car.

Pages 2 and 3 of Exhibit No. 1 reflect a freight car re-

quirement of 1,561,425 for all respondents and for all types of freight cars included in the study. The railroads owned 1,450,383 freight cars, leaving a deficiency of 111,042 cars or 7.66 percent of the roads ownership. The deficiency was confined principally to the box car (100,052). However, a rather large deficiency existed in covered hopper cars (4,657), refrigerator cars (3,610) and open top hopper cars (11,181). On the other hand, there was an excess of gondola cars (5,277) and flat cars (3,181).

* * * * *

[39] . . . . . .

2. Criteria Followed in the Ordering of New Cars Over the Past Five Years, and Those Proposed for Use in the Next Two Years or Longer, Including the Extent to Which Reliance is Placed on Renting Cars Instead of Owning Them.

While the method of arriving at decisions to acquire or not to acquire freight cars has varied from time to time, influenced by the economic outlook and by the widely varying considerations applicable to certain types of cars, the general procedure has been to consider the following items in approximately the sequence shown:

1. Traffic forecast for each commodity handled and expected to be carried. This is the result of detailed analysis by Marketing Research and other Marketing activities.
2. Changes in traffic mix brought about by changes in industry traffic patterns.
3. Change in fleet mix caused by the transfer of commodities from one type of equipment into another.
4. Changes in utilization brought about by improved operation and distribution practices and customer preference as to car type.
5. Effect of changes in packaging and industrial distribution economics.

[40] 6. Mechanical and commercial obsolescence of equipment, i.e., the number of cars expected to become unserviceable which will be beyond repair. This involves deciding whether the type of car under consideration is exposed to an obsolescence trend which would make acquisition of cars of this type subject to a shorter period of use than the physical life of the car.

7. Improvements or changes in bad order ratios.
8. Shop schedules and car builders lead time. The delivery of new equipment must be timed to match loading cycle upturns.
9. Maintenance programs required to maintain needed inventory level of equipment.
10. Are the cars being considered subject to control over

all movements by the owner because of their features or interior equipment, or are they general purpose cars?

(a) If the cars are subject to owner control, the next step in arriving at a decision will depend upon the relative profitability of the traffic to be expected from the exercise of that control.

(b) If the cars are *not* subject to owner control but are, rather, subject to general Car Service Rules, then the questions to be determined are:

(1) What per diem class will the cars fall into?

(2) What percentage of the time can they be expected to be available for originating loads vs. the days they will be subject to producing only per diem income?

[41] (3) Are the revenue movements expected to be produced from availability of the cars on line above or below average profitability, and by how much?

11. What rate of return will the type of car under consideration develop over its reasonably foreseeable economic life as contrasted with physical life?

(a) This involves projection of estimated revenues, incremental costs, income taxes on the contribution represented by the difference between these two figures, income tax savings from depreciation allowed for income tax purposes, maintenance and repair costs and estimated final salvage value. The actual cash inflow and outflow expected to result from these estimated amounts is discounted from the year in which they are expected to occur to the present time at a rate which will reduce the net cash inflow to the amount represented by the initial cost of the car. This is the rate of return used in determining the relative profitability of the investment and whether the investment exceeds Respondents' cost of capital. If the rate does not exceed Respondents' cost of capital, the proposed investment is subjected to further review to determine whether there are extenuating circumstances which justify expenditures for the proposed equipment.

[42] 12. What degree of risk is present in an investment in the proposed type of cars?

(a) If the car is a special purpose car, can it be converted to other purposes if the traffic for which it is to be acquired is lost. If the car is a general purpose car, are shortages of this type of car on other railroads so great that it will suffer undue detention on foreign lines? Unless it can be demonstrated that the per diem rate exceeds the Respondents' cost of capital, this risk may financially disqualify the investment. If the excessive detention will reduce the rate of return to a level which places it below that of all other cars for which funds may be currently available, then the acquisition of the cars may not be justified for this reason.

(b) Are there similar cars in Respondents' ownership of an advanced age which may become unserviceable and due for retirement within the reasonably near future, which would preclude the cars being considered from remaining in excess supply in the event of a decline in traffic? Where the age composition of the fleet is such that cars become scheduled for retirement each year, the risk of oversupply is thus limited to the period of time and number of cars which may be projected on this basis. Thus, shortages of cars which are expected to be of relatively short duration could result in an immedate investment decision to acquire such cars. [43] However, when shortages are the result of undue detention of cars by foreign lines at per diem rates, which do not reflect our cost of capital, then appropriations for new cars would not have the priority of capital expediture funds that would be given to cars which have better net revenue potential.

(c) Are the prospects for the improvement of turnaround time of the cars under consideration sufficient to rely upon this rather than the risk of acquiring new cars? As explained earlier in this statement, the turnaround time of our cars is the subject of continuous study and the results of those studies reflect improvements which have proven to be reliable guides.

During this process, the assumption is made that all equipment will be purchased instead of leased; however, if the economics of leasing result in a higher return on the investment, then that method of acquiring equipment is pursued. There is no set policy as to either alternative.

* * * * *

ARGUMENT

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[2] Statistical results of studies conducted by Respondents and introduced in Appendices C, D, E and F and the return to Appendix G establish that C&O-B&O own and contribute to the car supply of the country a far greater number of freight cars used in interchange service than they require for adequate performance of transportation service on their own lines. The imbalance of ownership, however, is not due to inefficiency or poor car distribution or handling practices on the part of these Respondents but because both carriers originate more carloads of freight which move off their lines than could be loaded in cars made available through traffic received from other railroads and terminating on C&O and B&O. The evidence demonstrates that these Respondents achieve efficient utilization of existing equipment and are continually studying the problem of car ownership, utilization and distribution to accomplish even greater utilization. The imbalance of ownership is also due in part to the fact that many other railroads have chosen to meet their shippers' needs with cars owned by other carriers and furnished under the existing per diem rules.

I.

RAIL CARRIERS CANNOT ACHIEVE MAXIMUM UTILIZATION OF FREIGHT CARS WITHOUT THE COOPERATION OF SHIPPERS AND RECEIVERS

Respondents acknowledge that there are not adequate sanctions in the existing Car Service Rules to encourage adherence and, consequently, they recommend the adoption of measures to insure compliance with these [3] rules. But, before sanctions are prescribed, it is urged that consideration be given to problems that occur even though

carriers strive to adhere to these rules. As a practical matter, carriers cannot always comply with the provision of the Car Service Rule which requires that off-line cars be loaded in the direction of the owning road without the cooperation of the shipper loading the car and routing the traffic.

* * * * *

II.

Adequacy of Ownership Cannot Be Determined Without Considering Car Rental Charges

[6] Per diem rates are a matter of great financial and economic significance in determining adequate car ownership, primarily because of the imbalance among railroads between freight car ownership and freight car use. It is well known that the charges against shippers for freight transportation service include the use of freight cars. If the transportation service requires movement of the freight car over more than one railroad, each railroad receives a proportion of the freight charge based on the amount of service provided. As a consequence, when freight cars are supplied by the shippers or by other railroads, the railroad performing the transportation service pays for the use of such cars out of its general funds rather than through a reduction or apportionment of the transportation charge. From both an economic and legal standpoint, it is the railroad's responsibility to supply the cars used in the transportation service for which the freight charges are collected.

Under the railroad transportation system that has developed in this country, freight moving over the lines of two or more railroads is not transferred from one car to another at junction points, but the cars themselves are interchanged freely. It is elementary that any railroad must have as many cars made empty on its lines or returned empty as it has loads offered to it by shippers in order to be able to provide adequate cars for loading. If empty cars are not returned to it by other roads, it must provide these cars through increasing its own ownership.

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V.S. No. 10—Harry J. Surles

(Great Northern Railway Company)

Preliminary Statement

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[2] The causes of such a shortage are manifold and include a lack of earnings in the industry to support an adequate car building program coupled with a lack of economic incentive to the railroad industry to acquire such equipment and use it efficiently.

Strong measures are required to eliminate some of the major causes for these shortages and include the following:

1. Establishment of car hire rates which will make the ownership of freight cars economically attractive. The present system of car hire encourages rental because it has been based merely on a sharing of accounted cost narrowly conceived and determined rather than upon a sharing of all the economic burdens of freight car ownership. Great Northern believes that the passage of Senate Bill 1098 would result in a car hire system designed to bolster the present inadequate national car fleet. It would also encourage more efficient car handling through economic incentive.

[3] 2. Establishment of a just car ownership formula measuring each road's contribution to the fleet on the basis of the use which each road makes of that fleet.

3. Renewed efforts should be made to improve efficiency by increased loadings, faster turn-around time, shorter routes, and diminished terminal delay. This includes stricter enforcement of and compliance with car service rules.

This argument is addressed to the second of these subjects, i.e., an adequate car ownership formula. It is the position of Great Northern that each road has a responsibility to supply cars to the national fleet equivalent to the "use" it makes of the cars in that fleet. In this context "use" is not confined to "loadings" or to "unloadings" or to any other fraction or part of the total time (or miles) during which a road has a car. "Use" includes the entire use made of the fleet measured by car days or car miles.

* * * * *

An Equitable Car Ownership Formula

Railroad car equipment is interchanged between carriers because both the efficient handling of traffic and the Interstate Commerce Act require such interchange.

* * * * *

[5] "At such times the Colorado & Southeastern Railroad must take the burden of furnishing cars for all that portion of the through transportation which is performed upon its line; *that is to say, it must provide such a supply of cars as would be sufficient to enable it to perform its part therein if there were car-for-car interchange at its junctions.*" (Emphasis added).

This theory is not only equitable as between participants in the joint venture, but also proportions the amount of car ownership to total national traffic requirements. In other words, if each road owns enough cars to efficiently handle and accommodate that road's ton miles or car days, the total national ownership is likewise able to efficiently handle and accommodate the total national ton miles and car days. Other suggested formulas fall short of meeting national requirements and are not in the public interest.

* * * * *

[23] (6) Other practices, or changes in practices, for improvement of the Nation's car supply situation.

There is not a sufficient ownership of cars in the nation's fleet; however, better tools for better utilization are being developed every day, and better utilization of available cars should result. If per diem rates were doubled or tripled, better utilization would result. If empty cars assigned to a shipper were subject to demurrage rules, better utilization would result. Much improvement is needed in observance and enforcement of car service rules.

* * * * *

[3] 9. Means to reduce turnaround time are subject to constant scrutiny. These efforts include working closely with shipper and receiver. Adjusting of switching assignments and over-the-road schedules are made to provide the most favorable turnaround time. Proposed Management Information System (See Item 2, Page 1) will provide a means for complete analysis of turnaround time.

10. Constant effort has been made to encourage shippers to promptly load cars, and receivers to promptly and completely unload cars, including all debris. We have published certain tariffs that provide less free time for loading or unloading cars than provided by the general demurrage tariff. Carriers have no effective control for the removal of all debris by the industries.

11. Each operating officer has the responsibility for reducing wasteful practices in car detention. Various reports are required which indicate car detention. Instances of bad practices are called to the attention of those responsible.

12. Car service rules outline the most efficient use of cars. These rules are circulated to all concerned, including traveling transportation men. We attempt to get the fullest practicable compliance with these rules.

13. Rates have been published which provide an incentive for heavier loading of equipment. A concerted drive is in effect to acquaint shippers with the carrying capacity of cars to encourage heavier loading.

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V.S. No. 15—W. T. Ross and L. M. Newton

(Norfolk and Western Railway)

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[6] A.A.R. Car Service Order C-411, with certain modifications, under which the Norfolk and Western supplies all the cars (with few exceptions) for loading at N&W mines, and which requires that hopper cars of N&W ownership generally be returned home empty, has been an *absolute necessity* in meeting the demand for cars by coal operators on the Norfolk and Western System. This C-411 order is also most important to other carriers originating cars subject to such order, and benefits connecting and terminating carriers by relieving them of investment in such cars.

* * * * *

[10] 12. Efforts to ensure fuller loading of cars toward owners' rails.

If the term "fuller loading" refers to the quantity of lading in each car, then incentive rates and specialized equipment serve as an effective means of accomplishing such a purpose.

If the term "fuller loading of cars toward owners' rails" refers to an improvement in the home routing of foreign cars, then compliance with Car Service Rules and I.C.C. Orders covering movement of cars made empty on line are the major efforts put forth in this area. Our operating personnel are familiar with the various rules with respect to the handling of foreign cars and make every effort to see that such cars are handled in accordance with the rules.

* * * * *

* * * * *

[6] 12. Efforts to insure fuller loading of cars toward owners' rails.

Regular checks are made by our transportation people with the cooperation of AAR Car Service Division Agents to secure full compliance with Car Service Rules.

13. Other steps taken to improve car utilization.

(a) We offer rate incentives which make it attractive for shippers to load cars to full capacity.

(b) We also have added forces to keep bad order cars at a minimum.

(c) We inspect and classify cars in train yards to avoid movement to repair tracks for classification.

(d) In our car acquisition program we endeavor to get general purpose cars suitable for as many commodities as possible.

(e) Wherever authorized and feasible we use trucks of our subsidiary, Northern Pacific Transport Company, to make delivery of LCL shipments in order to conserve rail cars.

* * * * *

[12] 6. Other practices, or changes in practices, for improvement of the Nation's car supply situation.

The national freight car supply can be improved in the following ways:

1. Establish incentive per diem which will make the ownership of freight cars more profitable and attractive from an investment standpoint to railroads which are deficient in ownership. The passage of Senate Bill 1098 and its effective implementation by the Commission would [13] result in an increase in the national car ownership.

2. Establish ownership quotas for all classes of cars for all railroads and make it mandatory for railroads to meet the quotas by purchase of new equipment.

It is recognized that such quotas could not possibly be high enough to take care of peak demands in certain seasons of the year, but in those seasons the right of railroads having adequate ownerships should be respected by the issuance of exclusion and send home orders when the cars

on line of such railroads fall below a percentage, such as 80% or 85%.

3. Greater utilization of the freight car supply must be achieved by intensification of efforts to improve the turnaround time. If just one mile can be added to the car miles made per serviceable day, it would have the effect of adding many thousands of serviceable cars to the national fleet.

4. Observance by all railroads of Car Service Rules and special car orders issued by the Car Service Division. A stricter exercise of authority by the Car Service Division under Per Diem Rule 19 would assist materially.

5. Better control of special cars assigned to interline car pools, to reduce detention of cars in slack period.

6. Reduction in car delays caused by utilization of equipment for storage purposes, such as repeated inspection of grain, circuitous routing, and excessive free time.

* * * * * *

[2] It is recognized that such quotas could not possibly be high enough to take care of peak demands in certain seasons of the year, but in those seasons the right of railroads having adequate ownerships should be respected by the issuance of exclusion and send home orders when the cars on line of such railroads fall below a percentage, such as 80 or 85%.

3. Greater utilization of the freight car supply must be achieved by intensification of efforts to improve the turnaround time. If just one mile can be added to the car miles made per serviceable day, it would have the effect of adding many thousands of serviceable cars to the national fleet.

4. Observance by all railroads of Car Service Rules and special car orders issued by the Car Service Division. A stricter exercise of authority by the Car Service Division under Per Diem Rule 19 would assist materially.

Any discussion of the subject of railroad car shortages must take into consideration (1) adequacy of car ownership, and (2) utilization of cars. In this argument, we will briefly discuss both considerations.

* * * * *

[5] (2) *Car utilization*

We on the Northern Pacific also feel that to a great extent an incentive per diem will result in a more economic utilization of cars. It must surely be clear that a low per diem encourages one road unnecessarily to detain the cars of another, and that a high per diem will encourage the return of cars to their owners.

For many years the Northern Pacific has suffered from car shortages, that is, the inability to furnish cars to shippers who desire transportation, despite the fact that the Northern Pacific has *owned* an adequate supply of cars. The trouble has been that year after year in its busy season the Northern Pacific has found itself with a very small

percentage of its car ownership on line, while at the same time other roads have had on line many more cars than they own.

* * * * *

[2] Discussion of Subjects Listed in Appendix G.

Car Utilization.

1. Assignment of cars *in accordance with previously predicted traffic flow.*

Respondent has always attempted to assign cars on the basis of traffic flow information, both present and projected. This information has been greatly improved through respondent's data system, discussed in "2".

2. Installation of an electronic data processing system to be used *in part at least* as an aid to improving utilization of freight cars;

and

Installation of communications system to be used *in part at least* as an aid to improving utilization of freight cars.

Beginning in 1960, the Pennsylvania Railroad developed and installed a Freight Car Movement Reporting Computerized Data Processing System which for several years has included 180 mechanized field locations established at yard or station offices. These mechanized points generate input data for processing at the Data Center in Philadelphia as well as information transmitted between mechanized points for local purposes.

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[11] 12. Efforts to ensure fuller loading of cars toward owners' rails.

We believe the most efficient utilization of foreign equipment must be in compliance with the Car Service Rules, which is only possible when all car data is "real time" information. Our object is to perfect this goal to the best of our ability which will be accomplished by the automated car movement reporting system.

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V.S. No. 10—W. D. Lamprecht, John B. Reid, F. Wascoe
(Southern Pacific Company)

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[13] Under-Utilization and Car Shortages

Our experience suggests that *under-utilization of existing equipment* may be the one factor which, above all, is responsible for sporadic car supply difficulties. The solution does not lie in simply pouring more cars into the nation's fleet, but rather in improving the efficient use of what we already have.

We do not think there can be any serious argument over the point that substantial improvements in the efficiency of transporting freight are yet ahead of us, not only in terms of bigger and better cars with lower ton-mile operating costs, but also in terms of more efficient utilization of existing serviceable freight cars. The Commission's 78th Annual Report, 1964, shows that the turn-around time for the Class I railroads' fleet of freight cars ranged from a low of 12.87 days in 1963 for flatcars to as much as 32.96 days for refrigerator cars, with an overall average of 18.74 days (p. 137). At the same time the average length of haul, considering the United States railroads as a system, was 463.97 miles (p. 144).

* * * * * *

[36] Redistribution of Burdens Within the Railroad Industry

We appreciate that the burden of car supply is inequitably distributed today. For example, with specific reference to our forest products shippers, Southern Pacific has taxed itself to the limit of its ability to construct new cars and to upgrade old cars to make them desirable for lumber and wood products loading. Lumber shippers prefer wide-door boxcars, but the eastern and midwestern lines who participate in the transcontinental haul and frequently receive the majority of transportation revenues from a given shipment are not, in our view, contributing adequately to this pool.

Our interest lies not in pointing the finger of blame, but rather in correcting the situation, and in our analysis the two key factors are *incentive* and *ability*.

By incentive I mean the incentive of rail carriers to serve their shippers well. Incentive comes from a system of *per diem* rates that provides the car owner a fair reward for the expenses associated with the car ownership, while the car is off-line. Incentive also means a system of *per diem* rates which encourages the prompt return of cars to their owners for further service. Southern Pacific has been a leader in the industry in sponsoring a system of graduated *per diem* rates which will assist in accomplishing these objectives. These will promote incentive within the railroad industry; further incentive is provided by the shippers, who in practice tend to reward car owners who provide them with equipment. Shippers quite logically tend to favor the line which provides them with cars, and this is as it should be, for this is a powerful inducement to the rail carriers to provide industry with ample equipment for its transportation needs. [37] The second key factor is *ability* and by this I mean the financial ability of the railroads to equip themselves with cars. It is not the *incentive* which is in need of Commission stimulus, but the financial *ability* of the carriers. Long-range solutions require more than contemporary bickering among the carriers as to who is and who isn't doing his part, but a thoughtful program to place the entire railroad industry on a sound financial footing from which it would be able to expand to meet any new need of the shipping public.

The underlying cause of today's tight supply of modern wide and double door boxcars is simply this—that a very substantial part of the railroad industry up until quite recently has not been financially able to afford the purchase of new cars in sufficient numbers. From 1961 through 1964, as railroad earnings improved, capital expenditures for equipment almost tripled—from $427 million to more than $1.1 billion, and car builders are now working to capacity. Orders placed today, however, will take six to nine months for first deliveries.

Southern Pacific's efforts to increase the supply of new freight cars has not been limited to its own fleet. In March of 1964, it acquired Bankers Leasing Corporation, a Boston, Mass., based concern which has a national reputation in the equipment leasing field. Bankers Leasing Corporation is in a position to assist other roads which can-

not purchase equipment outright to obtain new equipment under long-term leases. The corporation now has on lease to various railroads and to individual shippers some 2,500 new freight cars costing over 38 million.

* * * * *

[41] Of the $332 million spent in the last three years, $238 million was spent on new equipment and $94 million for other property improvements.

Of the $238 million spent on new equipment, freight cars made up the largest proportion of the total expenditure. About $160 million was spent on 9,132 new freight cars and $78 million was spent for the purchase of 332 diesel locomotive units. Southern Pacific, which has one of the lowest "bad order" ratios of any major railroad, spent $106 million during the same three-year period for repairs to freight train cars.

There has been an enormous increase in freight car costs in recent years. Virtually all the cars that have been purchased by Southern Pacific in recent years are equipped with roller bearings. Although the cost is greater than for friction bearings, the reduction in servicing costs and in interruptions caused by hot boxes justifies the investment. Today's cars are larger than they were 20 years ago, and many are equipped with special devices to prevent damage to the commodities while in transit. Twenty years ago, at the conclusion of World War II, a 40 foot, 50 ton box car could be purchased for about $3,800. They now cost between $16,000 and $19,000 each. Some special box cars cost as much as $37,000 each. The present $16,000 car is 60 feet long and has a capacity of 70 tons. Along with a 60% increase in the cubic capacity, the cost per cubic foot of capacity has risen from about $1.00 to $2.78. Locomotives cost about the same per horse power as they did 20 years ago, but units are considerably larger and therefore cost more.

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[2] The interest of the Department of Agriculture in this proceeding is in the development of conditions which will allow the railroads to have sufficient cars available where and when they are needed. This, we believe, can be accomplished by adequate car ownership and adequate utilization of cars. Development of information is contained in 6 attachments, which were prepared by me, or under my supervision.

[9] The lowest percent was 47.3 in 1920, the highest 65.0 in 1932. Page 2 of Attachment 4 shows the arithmetic empty return ratio in 1963, for all cars, was approximately 78 percent for the United States. A *weighted* empty/loaded average in 1962 was in the range of 58 percent to 68 percent. Form 1 of Form A for 1962 shows this ratio as 65 percent for the East on Sheet 1 entitled "Performance Factors in Running Service and Switching Service." Southern District was 68 percent and the Western District was 58 percent.

Other ideas have been expressed on possible solutions of car shortages. Attachment 5 reproduces portions of a Commission report, which contains the following:

> *Many credible witnesses who appeared * * * gave testimony that a great and immediate improvement in transportation service * * * might be affected by a change in the methods of use of present equipment* * * * To many witnesses * * * it was obvious that if cars were made to move faster and were kept moving their efficiency would be greatly increased. *Car shortage, in other words, may result as much from lack of wise methods in handling the cars which a company possesses as from a deficiency of cars.* * * * Maximum tonnage and maximum service are not necessarily equivalents. * * * The congestion of traffic arises at points of destination or at the terminals where freight is transferred from one line to another. This congestion has its effect upon all lines of railroad reaching such terminals, *for once a terminal contains more traffic than it can promptly handle and deliver, it acts as a dam which floods a constantly increasing area behind it.* * * *

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[2] That the shipping public has been seriously hampered for many years due to the inability of the country's railroads to furnish a sufficient car supply to properly service its customers is common knowledge which need not be discussed to any great length. The hearings conducted by the Senate [3] Commerce Committee during the first session of the 89th Congress on S. 179 and S. 1098*, bills to amend Section 1(14)(a) of the Interstate Commerce Act to insure the adequacy of the national railroad freight car supply, and for other purposes, point up the fact that there is a serious freight car shortage. Specific examples of recurring freight car shortages in the various sections of the country are cited in the Senate Committee's printed hearings entitled "Freight Car Shortages" (Serial No. 89-23).

The Senate Committee report on S. 1098 (Report No. 386) states that

> "The precipitous decline in our national freight car supply, especially in the number of plain boxcars, has reached alarming proportions. Not only is the inadequate supply of freight cars constricting the growth of important industries and causing severe nationwide losses to producers, shippers and consumers, but also it is eroding our transportation capability to move essential military traffic during emergencies."

Furthermore, the existence of freight car shortages was cited in the report of the Commission's Division 3 in Ex Parte No. 241, Investigation of Adequacy of Railroad Freight Car Shortages, Car Utilization, Distribution, Rules and Practices (323 I.C.C. 48) decided June 18, 1964. Basically, Division 3 found that the railroads as a group lacked an adequate supply of freight cars.

However, it is imperative that the Commission take note of the fact that the declining railroad owned car fleet has now reached such a critical level that unless strong steps are

* S. 1098 evolved into Public Law 89-340, approved May 26, 1966.

taken to reverse present trends the economic progress of the country will be hampered.

* * * * * *

[4] Statistics relating to car ownership paint a very dismal picture. The Commission's files are replete with statistics showing a continued erosion of car ownership. To highlight as simply as possible the present situation, we mention briefly a few facts relating to the car supply.

Association of American Railroads reports indicate that since *1950* the number of freight cars owned by class one railroads has dropped from 1,721,269 to 1,463,863, *as of May 1st of this year,* a *decrease* of 257,406 cars. During the period 1950 through 1964 the rail carriers increased their revenue ton miles from 588,578 millions to 659,327 millions, an *increase* of 70,749 millions. It is no wonder shippers are hard put to move their products when the equipment is gradually, but continuously, fading away. Even though cars now being built have a larger weight carrying capacity per unit than those being retired, the railroads today provide four million tons less of freight car carrying capacity than they did in 1956 which is a decrease of 4½%. (See testimony of Hon. Charles A. Webb, page 11, Printed Hearings on "Freight Car Shortages", *Supra,* Serial 89-23).

The growth of the railroads' chief competitors, the trucks and the barges during this car ownership decline, points to the need for a greater emphasis on cooperation among the several carriers to better utilize the total car fleet. Individual rail carriers must not look upon the national car shortage from the point of self interest. If a car shortage exists in one region, it seriously affects the business of carriers in other regions.

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[2] In a nutshell, there simply are not enough cars, in gross terms, to satisfy the demands of shippers.

* * * * *

[5] We have tried in every possible way to stretch the supply of cars. Average weight per car has increased since 1961 from 62,256 lbs. to 84,059 lbs. This has increased the revenue to the railroads and the utilization of cars, but has not solved the problem.

The Interstate Commerce Commission has been amazingly generous in its preferential efforts on our behalf. We have received car orders and special service orders many times, and these orders have been helpful to some extent, but they do not solve the problem.

In addition, we feel we cannot any longer ask for this special treatment, even though the cars were built by western roads for western shippers. It is simply impossible to issue effective service orders until more cars are available, or until it becomes uneconomic for a road to use others' cars. The ICC is in the position of stretching a shorter and shorter sheet over a longer and longer bed.

The effect on our industry has been to produce a state of constant crisis. Our car shortages vary in intensity, but they are always with us.

It is not just the producer who is affected. Our whole nationwide distribution chain is involved.

* * * * *

[10] However, we presently ship 90 per cent of our production by rail, and I am sure that the percentage will remain the same for the forseeable future as rail service is necessarily more suitable to the shipping requirements of our industry.

In the last month, we have had numerous shutdowns of mills because of a boxcar shortage, and we have had many production cutbacks. Even so, as an industry, we are producing more plywood than we can ship almost every week.

We need more boxcars.

Suggested Proposed Rule

It is suggested that the Commission promulgate a rule to be placed in the appropriate per diem tariffs reading substantially as follows:

> A rail carrier receiving a foreign line car for delivery purposes shall either return the same car or one with equal or better specifications to the origin territory in accordance with the present AAR car service rules or the per diem charges set forth in this tariff shall be doubled retroactive to the date the car was unloaded.

It is recognized that this proposed rule will have to be appropriately worded in order to conform to the Commission's tariff publication rules, but we believe we have expressed the substantive idea.

* * * * *

(Western Wood Products Association)

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[2] Our Association's members ship approximately 250,000 carloads of lumber, lumber products and related articles, not including plywood, per year. In excess of eighty-five percent of all shipments move by rail car and hence the Association's members are greatly concerned with an adequate car supply and a proper utilization thereof.

In excess of 400 small towns scattered throughout the area of the Association's memberships in the twelve western states are principally dependent upon the operation of mills engaged in the manufacture and processing of lumber and related articles. Because of the remote location of our member's mills from the principal markets, we rely very heavily on rail transportation.

We have incurred considerable difficulty in securing a sufficient number of rail cars to get our products to market. This is due to the declining number of rail cars suitable for lumber loading as is shown by Appendix B, hereto attached. Many of our members complain that there have been many instances in which they cannot get all of the cars they need, but are lucky to get one-half their requirements.

* * * * * *

[4] This matter of the shortage of rail cars has been discussed and rediscussed for many years without anything constructively being done. We are worse off now than we were last year, and this has been true of every year. The shortage is having and will continue to have an increasingly adverse effect upon the economy of our country. Something must be done immediately without delay. We hope the solution we suggest below will be a material benefit and assistance in this proceeding:

Proposed Rule

It is suggested that the Commission promulgate a rule to be placed in the appropriate per diem tariffs reading substantially as follows:

A rail carrier receiving a foreign line car for delivery purposes shall either return the same car or one

with equal or better specifications to the origin territory in accordance with the present AAR car service rules or the per diem charges set forth in this tariff shall be doubled retroactive to the date the car was unloaded.

(Public Utility Commission of Oregon)

[3] As noted by the Commission on page 2 of its June 18, 1964 Report in this investigation:

> "The efficient use of cars has been a major concern for many years. To cope with this problem railroad management voluntarily established car service rules to promote prompt handling, movement and return of freight cars. * * * * An inherent weakness in those rules is that there are no sanctions which encourage adherence and at times there have been widespread disregard of the rules."

The rules to which the Commission apparently refers are those contained in the Association of American Railroads, "Code of Car Service Rules, Freight". We have frequently studied those rules and it appears that their basic provisions are generally adequate to accomplish proper car handling if effectively enforced.

In the Commission's consideration of prompt handling, movement and return of cars we suggest that cognizance be taken of the present AAR "Code of Car Service Rules, Freight" and the following circumstances applicable thereto:

(1) The objective of the Code as presently published by the AAR is to accomplish proper handling, movement and return of cars and as such is desirable in alleviation of shortages.
(2) Provisions of the Code, if adhered to, are basically adequate to accomplish the objective.
(3) Lack of adherence to the rules has thwarted attainment of the objective.
(4) Nonadherence to the Code results from the absence of a sanctions provision therein.
[4] (5) A carrier association whose members are bound to the association and the code only by individual agreements which are subject to withdrawal by the subscriber would find the exercise of any sanction authority difficult, if not impossible, to administer.

Proposed Commission Action

In recognition of the foregoing circumstances we respectfully request that consideration be given to the following proposal:

> That the character of rules one through seven of the "Code of Car Service Rules—Freight" as presently published by the AAR be changed by making them Interstate Commerce Commission instead of Association of American Railroads rules. Prescription of the rules to be effected under authority contained in Part I, Sec. I (14)(a) of the Act with subsequent violations made subject to the penalty provisions of Sec. I (17)(a) of the same Part.

* * * * *

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[3] The Vulcan Materials Company is a Corporation, under the laws of New Jersey, with principal place of business at 1 Office Park, Mountain Brook, Alabama, and is engaged in the production of construction aggregate materials, (i.e. crushed stone, sand gravel and furnace slag), concrete products and chemicals; in the processing of tin plate scrap for the recovery of detinned steel, tin and other items; and in the fabrication of iron and steel articles. Vulcan Materials Company operates 143 plants, pits, quarries, and yards producing these materials located in 16 states in the nation. Specifically, Vulcan Materials Company has estimated that their requirements for cars to be furnished by the rail carriers for the year 1966, will be 143,523 cars, mainly open-top hopper cars and open-top gondola cars. Rail carriers have been unable to furnish anything like an adequate supply of empty cars for these installations, in some cases, completely closing down the plants for the lack of empty equipment.

* * * * *

[5] This information was also furnished to the Association of American Railroads and the Commission's Bureau of Safety and Service. The projected information is upgraded each quarter and furnished to the Association of American Railroads through the Southeast Shippers Advisory Board.

The car shortage became so critical that, approximately eighteen months ago, we began compiling records of cars ordered and furnished by each rail carrier at each plant. A statement headed "Weekly Car Order Recap" is issued weekly, showing the number of open-top hopper and open-top gondola cars ordered, received and short at each plant. This recap also shows the name of the carriers serving each plant and their performances as to car supply. Copies of this weekly recap statement are mailed to the Washington office and Atlanta, Georgia district office of the Association of American Railroads. The Commission's Bureau of Safety and Service also receives a copy of the weekly recap statement.

From the weekly recap statement, our Exhibits No. J-1 through J-10 have been prepared showing the carriers' performance of the number of cars ordered and the number of cars received by pit and quarry from January 1, 1966 through June 4, 1966. Explanations of these exhibits are made in Appendix "A".

* * * * *

[20] Therefore, in view of the above present rules and the statement of facts presented in our Exhibits No. J-1 through J-21 and as summarized above, we propose to the Commission the following set of Home Route or Car Supply Rules.

PROPOSED
CAR SUPPLY RULES

1. Carrier serving the industry has the responsibility of furnishing the shipper a sufficient supply of cars for loading.

[21] 2. Carrier owning cars should have complete control of their cars because of their responsibility to shippers on their line.

3. To give owning line control of cars, set up rules and penalties to enforce return of cars to owner carriers.

4. Except as otherwise provided in Rules 5, 6, and Note 1 below:

   (a) Cars loaded to a destination in the same state or to a destination in an adjoining state must be promptly returned to owning line immediately; loaded or empty.

   (b) Cars loaded to a point of destination in a state not contiguous to point of origin state may be loaded to any point of destination in any state served by owning line. Upon being unloaded at this destination, cars are then subject to Rule 4(a).

5. When origin carriers' requirements necessitate, origin carrier may require direct return of empty equipment to their line by endorsing waybill covering loaded movement, "When empty, return directly to owner via reverse of outbound route."

6. Origin carriers at their option may assign certain cars to a pool at points where they deem it necessary in order to maintain a sufficient car supply.

(1) Waybills covering loaded movements of such assigned cars must be endorsed as follows: "Assigned cars, when empty, return to agent at origin of last load in reverse loaded movement".

7. All empty movements of cars covered by Rules 4, 5 and 6 shall be accompanied by revenue form of waybill without charges, showing full routing by railroads and junction points.

8. Where cars are placed for loading and loaded contrary to Rules 4, 5 and 6, the line responsible will pay to the owning line, an amount equal to the per diem payments on the car from time car is misloaded until it is completely unloaded and released from that shipment. This is a penalty charge and is in addition to per diem normally due the owning line by the using lines.

NOTE 1: Where two or more said carriers serve the same plant in originating traffic, such carriers and such shippers may by mutual agreement provide for shipping loaded cars out without regard to carrier actually placing a particular car for loading. It is contemplated that such agreements will be subject to such reasonable conditions as will be equitable to all the parties such as a requirement that the total number of loaded cars shipped via a given carrier in a [22] particular period must balance with the total number of empty cars placed by that carrier during the same period. Cars loaded and forwarded under the provision of this note are subject to the balance of these rules the same as any other car.

We believe it is the carriers' responsibility serving the industry to furnish the shipper a sufficient supply of cars for loading. In order to do this, a carrier must have complete control of the cars which they own because of their responsibility to the shippers on their line. In order to give the carrier complete control of their cars, proposed rules as outlined in Rule 4, 5, 6, 7, and 8 should be put into effect. Rule 4 will place some responsibility on the shippers loading the cars and force them to sort cars out and load according to points of destination and not promiscuously at their convenience. The only way that empty cars can be returned to the owning carrier empty is by waybilling the empty car. If cars are released to be returned as some yard clerk feels so inclined to do, they will probably revert to the present system of Home Route Rules which are not enforceable.

The three points at which we experienced the greatest car shortage are, Barin, Georgia, Rock Hill, Tennessee, and Tri-States Spur, Alabama. All three of these points are located on lines of the carriers which do not extend to the destination territory. Barin, Georgia destination territory is South Georgia and Florida. Most of these points are not located on the Central of Georgia. Rock Hill, Tennessee destination territory is west Tennessee and north Mississippi points most of which are not located on the Louisville & Nashville Railroad. Tri-States Spur, Alabama destination territory is west Tennessee, North Mississippi and northwest Alabama. Most of these points are not located on the Southern Railway.

[23] In addition, all three origins are located in areas where there are few, if any, loaded open-top hopper and open-top gondola cars made empty. This means that empty open-top equipment must be moved in from terminals such as the following examples.

Barin, Georgia	Atlanta, Georgia Birmingham, Alabama
Rock Hill, Tennessee	Nashville, Tennessee Birmingham, Alabama Louisville, Kentucky Memphis, Tennessee
Tri-States Spur, Alabama	Atlanta, Georgia Chattanooga, Tennessee Memphis, Tennessee

From the above it can be seen that empty open-top equipment must be moved a substantial distance for loading at these points under the present rules.

Therefore, we have included Rule 6 in our proposed change which would give the origin carrier, serving the quarry, the right to assign a sufficient number of cars to a pool to take care of its foreseeable needs. Return of cars empty to the origin point in such cases would probably involve even less empty miles than are generated under the present rules. This would not only provide a more equitable portion of the total car supply for such points but might well produce a substantial savings in car days.

At the present time, there are no ways of enforcing the present Association Railroad Home Route Rules. Our pro-

posed Rule 8 would put some teeth into them so that they would not be ignored, as is the case today with the present rules in so many instances.

Discussion and Argument

The Time for Action Is Now

[25] With the exception of a few short periods here and there, the United States shipping and receiving public has been forced to live with a state of constant car shortage and inadequate railroad service ever since the conclusion of World War II—twenty long years.

In Docket No. 29669, *Car Service, Freight Cars*, 268 I.C.C. 687 decided July 25, 1947 at the bottom of page 703, your Commission stated:

> "We further find that respondent railroads as a group have failed to furnish adequate car service, to the detriment of the shipping public."

Then in the interim report herein dated June 18, 1964 at page 19 near the bottom, your Commission again stated:

> "The returns (to certain questionnaires) confirm in more specific terms our previous information as to the existence of a substantial inadequacy of ownership in more than one category of freight cars throughout the United States."

Later on that same page, your Commission stated:

> "The problem obviously requires a solution. Managerial discretion has not been able to solve it. The service order technique does not add cars; it simply requires all shippers to share in this freight car poverty."

We certainly hope that in its final order herein, the Commission will live up to the high hopes of the above promise by taking specific definitive action, and that this will not wind up as we have in so many other instances with mere pious admonishments to the carriers to do better in the future.

R.V.S. No. 2—Robert D. Lake

(Bessemer and Lake Erie Railroad Company)

[1] On October 14, 1966, I filed a verified statement in this proceeding. This supplement covers the subject of mandatory car service rules proposed by C. C. Robinson in behalf of the Commission's staff. As the executive officer charged with the duty of supervising the operations of Bessemer and Lake Erie Railroad Company (Bessemer), I am familiar with the present car service rules and the Robinson proposals.

In our opinion, any set of mandatory car service rules is not practical, would be extremely wasteful of existing equipment and would make it difficult, if not impossible, for our railroad to furnish adequate car service to our customers.

[2] The Robinson rules, I understand, will be discussed in detail by other parties. I shall comment briefly on his proposed Rules 2, 3 and 4. The Bessemer serves numerous large and small shippers in the Pittsburgh District as well as along its lines between the Pittsburgh District and Conneaut, Ohio, and Erie, Pa. Under proposed Rules 2 and 3, mandatory compliance would require that the shipper know far enough in advance about the destination of any given shipment for him to notify the carrier and for the carrier to then procure a car meeting the requirements of the proposed rules, and to move it to the shipper's loading track. The preceding process might consume as little as a few hours or as much as a few weeks, thereby subjecting the shipper's loading schedules to a severe variation and introducing a possible long delay between having the goods prepared for loading and the actual loading into a railroad car. Shippers are not now exposed to this uncertainty and long lead time in arranging for shipment via other modes. We conclude that they would not tolerate the imposition of such conditions in the case of rail car loading. It is also evident that such a process would lead to a markedly reduced usefulness of car equipment as a result of having to move empty cars, which do not comply, while at the same time having to move other empty cars long distances to get a car that meets the proposed rules.

R.V.S. No. 3—C. D. Cotten, Jr.

(Birmingham Southern Railroad)

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[3] . . . Many times what appears to be a car shortage in the early morning is eliminated by using cars made empty later in the day.

The proposed mandatory car service rules would, in my opinion, unnecessarily increase our costs, not only from an administrative standpoint, but because they would force us to perform additional switching which would result in longer railroad detention with wasted car days because of the necessity of moving empty cars from and to various points for loading, when cars which had been unloaded and were already at those points could be used. The combination of increased switching and handling is bound to increase railroad detention, with no improvement in customer detention. . . .

* * * * * *

It is difficult for us to see how the imposition of these proposed rules could result in better service to the customer; we believe the reverse would be true.

R.V.S. No. 5—Paul C. Dunn
(Boston and Maine Corporation)

I

The Proposed Gunderson Ownership Formulae Contradict Efficient Car Utilization Practices as Embodied in the Car Service Rules, and If Implemented Would Dislocate the Ownership of the Fleet

[2] Since the turn of the century railroads have been required to accept the freight cars of other railroads when offered in through transportation. By statute and regulation railroads are forbidden to reject foreign cars at the junction point and forbidden to demand reloading into home cars.

Thus Congress and this Commission require all roads to accept foreign cars, and every railroad recognizes a duty to pay for such cars, even though a railroad rents not by choice, but by administrative fiat. To further these requirements of the Commission, the railroads and their trade associations have established rules and regulations which spell out the details of car service. These Car Service Rules are on file with the Commission, and are the result of decades of practical experience and continuous re-examination of car service practices.

In brief, the Rules require that foreign cars be given preference in loading to destinations on, over, or "closer to" that car's home road.

It is generally agreed that the car owner is entitled to get his car returned from off-line with [3] reasonable promptness. This return movement must be either loaded or empty. To my knowledge no responsible railroad authority has ever suggested that an empty return movement is as desirable as a loaded return movement. It is evident that the home car, if loaded, would move parallel to the foreign empty being returned. In addition, it is very likely that the home car, when it reached its destination, would be returned empty *even in time of car shortage* and even from the *very roads claiming to be short.*

For instance, the study in this proceeding shows, for the month of October, 1964, that the Boston and Maine received 709 empty system boxcars from connections, and only 273

loaded system boxcars. Yet the flow of traffic is *toward* the Boston and Maine. In other words, if the Boston and Maine loads a home car even to an area of extreme shortage, the odds are it will come back empty. Thus, the Car Service Rules, when obeyed, avoid not just one empty backhaul, but more probably two complete empty movements.

* * * * *

[7] The principle which will enable the industry to most fully utilize each and every car is obviously what Coughlin calls the "Ownership Principle, with Flexibility." This system moves more traffic per car than any other. To make it work, it is essential that users be required to load foreign cars in preference to home cars.

Yet voluntary or mandatory compliance with the Rules directly contradicts the car ownership formula preferred by Witness Gunderson. The formula in Gunderson's Exhibit 1 is a strict ownership proposal, which would obligate every carrier participating in a given traffic to own an aliquot share of the fleet. Neither that formula nor the formula in Gunderson's Exhibit 3 takes into consideration the fact that efficient transportation dictates that homebound cars carry loads where possible. This necessarily means that predominantly terminating carriers must use the cars of other roads in preference to their own. A car owner purchases cars for the use of its shippers,* and is entitled to control its own cars. Those cars are suitable for traffic originating on the [8] owner's line, not on the lines of other roads. Again to quote Witness Robinson:

> "Only the line serving an industry has complete familiarity with the industry's car requirements. Thus, the lines serving large numbers of grain shippers have owned substantial numbers of 40-ft. box cars equipped with 6-ft. single doors that are easily coopered to hold bulk grain away from the doorway. Lines serving major lumber producing areas will own large numbers of wide door box cars, both 40-ft. and 50-ft. lengths to

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* Attached hereto as Exhibit _____ [PCD-5] are true copies of the pages of the transcript and Exhibits in *Chicago, R. & Q. R.R. v. New York, S. & W. R.R.*, ICC Docket No. 31358, et al. containing sworn testimony by Witnesses for the Atchison Topeka and Santa Fe, the New Haven, the Boston and Maine and the Chicago, Milwaukee, St. Paul & Pacific Railroads, in support of this statement. Said true copies are offered herein pursuant to Rule 1.82 of the General Rules of Practice before the Commission.

permit easier loading of packaged lumber. Other factors determining the choice of cars purchased may include cubical capacity, length, width, weight carrying capacity, load cushioning devices, floor and side-wall construction, and doors, etc." Verified Statement of Charles C. Robinson, p. 115.

Any car ownership formula that refuses to recognize both the propriety and practical effect of the Car Service Rules is patently unsound. The adequacy of a given car fleet cannot be assessed unless empty cars of foreign ownership (and which are available for loading and which are required to be given priority in loading by the Rules) are subtracted from interline requirements. Under the proposals of Witness Robinson the substitution of a home car when a foreign empty is available would result in subjecting the offending road to legal penalties under the Interstate Commerce Act. The primary right and duty to own cars is and must be, on the originating road.

* * * * *

R.V.S. No. 9—William J. Day and W. P. Carey

(Denver and Rio Grande Western Railroad Company)

* * * * *

[5] The importance of fully utilizing the existing national car fleet cannot be overemphasized in the task of adequately supplying shippers with sufficient rail cars for transportation of freight. Shortages of rail cars can be reduced, if not eliminated, by more efficiently utilizing existing equipment in conjunction with adding new equipment to the fleet mainly for special purposes.

* * * * *

[8] In addition to the long range project embarked upon, a number of interim activities have been instituted to help relieve the car shortage problem and to provide a better movement of loaded and empty cars. Among these are:

(1) During 1965 the Rio Grande initiated lighter and faster trains across the property. This has expedited the movement of cars and has improved customer service. Future installations will result in computerization of schedules, motive power and consists.

(2) Scheduled switching—In an industrial terminal schedules have been developed with our customers to provide for a more consistent delivery of cars on a daily basis, relieving yard congestion.

(3) A great deal of work has been accomplished with our connections to help each other in expeditious movement through terminals by providing much more finite blocking of trains. This work is continuing to further improve movement in connecting schedules. In conjunction with this blocking, details have been worked out with a number of our connecting roads to provide for a direct connection with only a twenty (20) minute terminal delay. In some cases provisions have been made for the exchange of power for this direct connection.

R.V.S. No. 12—Donald B. Shank

(Duluth, Missabe and Iron Range Railway Company)

[1] My name is Donald B. Shank. I am Vice President and General Manager of Duluth, Missabe and Iron Range Railway Company, with offices at 500 Wolvin Building, Duluth, Minnesota, 55802.

This statement supplements my reply statement filed in this proceeding under date of October 14, 1966, in which I said on page 2: "Further comments on Mr. Robinson's proposals will be supplied in a statement I will file at a later date."

The rules and regulations proposed by Mr. Robinson place such restrictions on car movement and detention that wasted car days and increased railroad operating costs will result both for the Duluth, Missabe and Iron Range Railway and its shippers.

* * * * *

[2] The EJ&E opposes mandatory car service rules in any form, because mandatory rules would make efficient railroad operation and service to our customers impossible and would impose an unreasonable burden on our company. We believe that the Commission and the Car Service Division of the Association of American Railroads (AAR), through car service orders, can effectively alleviate such car supply and distribution problems as may arise from time to time.

We understand that a witness for the AAR will discuss in detail the rules proposed by Mr. Robinson. I shall devote my principal attention to the catastrophic effect that mandatory rules would have on the EJ&E's operations and service.

To determine the effect of the proposed car service rules, we made two detailed studies of the EJ&E's operations, the first on August 8, 1966, and the second covering the entire month of October, 1964.

The first study covers the loadings for one day, August 8, 1966, at five plants of the United States Steel Corporation, four located at Gary, Ind. (Gary Slag Division, Gary Works, Gary Sheet & Tin and Gary Tube Division) and South Works at South Chicago, Ill. The date of August 8, 1966 was selected at random after we began our study of the ICC staff proposals in this case. In this study we show that strict conformance to the proposed car service rules will result in a decrease [3] in car utilization and an increase in operating cost for the EJ&E.

Loadings from these five major industries on line represented 62.3 percent of total system loadings. A total of 431 industries are served by the EJ&E.

The second study covers total system activity on gondola loadings for the month of October, 1964 taken from data supplied to the Commission under Ex Parte 241. In this approach we show that application of the proposed car service rules would result in serious inefficiencies in car service by the imbalance of available gondolas between Eastern and Western line ownership.

A. *Analysis of Operations—August 8, 1966*

This analysis covers the five major industries named above. We made a listing of all car loadings for the five industries including data on car number and ownership, date and point of receipt, contents, point of interchange, routing and destination. We then analyzed each car movement, checking ownership against routing and destination to determine what additional handling would have been necessary for strict compliance with the proposed car service rules. The additional empty movement of cars to and from interchanges and between industries was then evaluated in terms of additional car days and locomotive crew time by use of engineered operating time and cost standards.

This resulted in an additional 1,172 car days or $3,575 per day and an increase in locomotive and crew cost of $6,220 per day [4] for a total additional cost of $9,795 for the operations of August 8, 1966. See my Exhibit 14.

For most of the past two years, the car supply on the EJ&E has been just about equal to the demand; shortages have been small and of short duration. Except for foreign hoppers, it has been necessary to use most inbound cars unloaded and to supplement these with additional empty cars from the trunk lines. Exhibit 15 shows that on August 8, 1966, we loaded 1,044 standard railroad cars of which 816 or about 78 percent of the total were supplied from cars unloaded. This means that 228 cars or about 22 percent of the total were supplied empty from the trunk lines. I point out that when cars released from loading on line are used for outbound loading, there are practically no lost car days other than the time for movement from unloading to loading points. In most instances cars are reloaded in the same plant where they are unloaded, and often on the same track.

Exhibit 16 shows that strict compliance with the proposed car service rules would have resulted in the handling of 690 additional empty cars and would have increased car detention from 2,925 to 4,097 days, an increase of 1,172 car days or a 40 percent increase in car days.

In the analysis of the movement of cars, it was not feasible to break down the different classes of cars into the specific types of cars in each class. For example, we have treated all gondolas as one class. Actually, these cars are divided into [5] cars of various lengths, drop ends, wood

or steel floor, and covered, etc. If the car data was completely detailed by type, it would no doubt show considerably greater loss of car days and extra car movements required to comply with the proposed car service rules. For this reason, we consider that the estimate of the additional car days which would result from strict compliance with the proposed car service rules is conservative.

In addition to the car days which would be lost as a result of strict compliance with the proposed rules, we would also have the additional cost of moving these cars to meet the requirements.

The most significant of these costs would be incurred in our Transportation Department. First, each car that could not be loaded without violating the proposed rules would require extra switching, either to put it to an appropriate loading point or to return it empty to the proper interchange point. Second, each car would require at least one extra classification to put it in position to be moved to the new loading point or to interchange. Third, assuming our customers were able to furnish information in advance as to their car requirements by destination and routing, additional switching would be necessary to spot loading tracks in proper order to allow the customer to load in compliance with the proposed car service rules.

Applying our engineered operating time and cost standards to the necessary car movements, we calculated a requirement of [6] four additional yard locomotives per day in addition to an increase in road and transfer work. This resulted in an increase in locomotive and crew cost of $2,270,610 per year. Also, it would be necessary to add car providers or distributors at all major yard locations, and this would further increase our costs by $133,600 per year.

Including the added annual per diem cost of $1,304,875, our total additional cost would amount to $3,709,000 per year. With approximately 556,000 cars of revenue freight annually, the added cost is about $6.67 per revenue car. See my Exhibit 14. Let me emphasize that these additional costs were calculated from our study of August 8, 1966 covering only five of our industries representing about 62 percent of our car loadings. This did not take into consideration the effect on our costs in serving our other 426 industries under the proposed car service rules.

* * * * *

[8] Exhibit 18 displays total gondola car loadings routed to Western and Eastern lines for August 8, 1966 and for the month of October, 1964. This shows that approximately 70 percent of these gondola loadings were routed to our Western connections and 30 percent to our Eastern connections. A tabulation of all gondola cars received loaded and empty from interchange during October, 1964 disclosed that 71 percent of the cars received were Eastern line ownership while only 29 percent were Western line ownership.

This leaves an indicated imbalance of Western line ownership gondolas available for the loading to our Western connections by our customers. On the other hand, there is available a substantial surplus of Eastern line ownership gondolas which under the proposed car service rules would have to be returned empty to those lines.

This imbalance of gondola ownership would be further complicated for the EJ&E under the proposed car service rules because of the fact that we have direct connections with 18 major lines. We would be required under the proposed car service rules to see that cars owned by these 18 lines were loaded to or via these individual lines, i.e., AT&SF cars routed via AT&SF, PRR cars via PRR, etc., or if such loading was not available within 24 hours, to return these cars to said lines empty.

The proposed rules would permit the substitution of EJ&E cars when proper foreign cars are not available. However, the [9] continual substitution of EJ&E cars for shipments off line would deplete the supply of EJ&E cars available for intraplant switching service. This would create a serious problem as the movement of raw materials within a steel plant is absolutely vital to its continued operation.

C. *Operations at U. S. Steel Gary Works*

To bring into sharp focus the problems the EJ&E will be faced with if Mr. Robinson's proposed car service rules are adopted, let me briefly describe our operations at one of our major industries.

Gary Works of the United States Steel Corporation, with an annual ingot capacity of eight million tons, is the world's second largest steel plant, located on a 1,500-acre tract of land. The EJ&E is the only common carrier railroad providing service to this Industry.

In carrying out its common carrier responsibilities, the

EJ&E averages 55 locomotive assignments per day. The Industry operates, on the average, 90 locomotive assignments daily, primarily in handling special non-standard railway equipment such as ladles, ingot buggies, etc. This combination of 145 locomotive assignments operates over approximately 225 miles of tracks with over 1,600 switches and turnouts within this plant.

* * * * *

[13] The proposed car service rules provide that foreign cars shall be loaded to or via owners rails or delivered empty to the owner lines. The study made on August 8, 1966 showed that 75 percent of the gondolas released from inbound unloadings was of Eastern line ownership, while about 75 percent of the shipments from the Merchant Mills was routed via our Western line connections and only 25 percent via our Eastern line connections. This is exclusive of local shipments and shipments to the Chicago Switching District.

To comply with the proposed rules would mean that about 50 percent of the empty gondolas received from the open hearth area would have to be handled through this complex network of tracks to a classification yard outside the plant and then moved empty to our Eastern connections, plus an additional handling of a like amount of proper ownership Western line empties, if available, from our Western connections to replace these cars.

Under the proposed rules, the Industry would be required to order specific ownership cars for spotting at these Merchant Mills. If these cars are not immediately available, the particular bays on the tracks these cars were intended for would have to [14] be left open until cars were available.

The problems of the Industry would soon start pyramiding because of their limited floor space, and the Industry would shortly be faced with a choice of either shutting down or diverting the steel piled up in its Merchant Mill warehouses from rail to other forms of transportation.

The changeover from rail service to other forms of transportation would be immediate and far reaching. May I refer to Exhibit 7. The cars of revenue freight handled dropped from 819,607 in 1955 to 555,978 in 1965, and the tons handled dropped from about 40 million to about 30 million during this same period. However, the 30 million tons of freight handled in 1965 were the second highest since

1957, which indicates a reversal of the trend away from rail service.

We have been striving to continue this trend back to rail service, but this can be accomplished only by having flexibility in the terms and enforcement of car service rules that will permit the loading of freight cars at or near the location where the car becomes available for loading.

D. *Conclusion*

In our opinion, strict compliance with the proposed car service rules, while still maintaining a competitive position with other modes of transportation, would be impossible. My statement shows that strict compliance with the proposed car service rules would adversely affect our service to our customers by reducing car supply and impeding efficient car use. We are vigorously opposed to the imposition of any mandatory rules.

R.V.S. No. 19—I. W. KING

(Louisville & Nashville Railroad)

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VIII. ORIGINATIONS V. TERMINATIONS, COAL AND OTHER TRAFFIC

[24] Because the L&N delivers much more traffic to connections than it receives from them, it is, in periods of high-car usage, in a perilous position with respect to its car supply.

In 1965, the L&N delivered to connections 344,343 cars of its originated coal. That is an average of 28,695 cars per month. We terminated on the L&N in the same year 21,052 cars of coal received from connections, which is an average of 1,754 cars per month. Thus, the excess of hopper cars going off-line over foreign line coal cars terminated by the L&N is almost 27,000 cars per month. It is only because of the protection afforded by AAR Car Service Order C-411, [25] which requires the empty return of our coal cars, that we are able to meet our shipper needs. Without this car service order, the L&N coal-car supply could be drained away to meet the needs of connecting lines and those beyond in a very few weeks.

On traffic other than coal, the L&N is in the same situation, but to a lesser degree. On this traffic, our carload deliveries to connections exceed our terminations from connections by approximately 35,000 cars per year, or almost 3,000 cars per month. If the carriers terminating this L&N originated traffic used L&N cars to meet their own shortages, we would, in a very short period of time, have insufficient cars to meet our shipper requirements. Additions to the L&N car fleet would not materially improve our situation if the cars were used for loadings on other railroads.

IX. THE ESSENTIAL NATURE OF AAR CAR SERVICE ORDER NO. C-411 AND WHAT WOULD HAPPEN WITHOUT IT

In the early 1920's we, along with certain other coal-originating railroads, obtained from the predecessor of the AAR a car service order numbered C-411, which required coal cars to be returned empty to the owning road. The order is still in effect. While it contains no penalty pro-

vision, it is respected by our connections; and because of it, we are able to substantially meet the needs of our shippers for coal car loadings.

* * * * *

[20] . . . The technological revolution and competition from abroad have been forcing a very rapid change in substantially all marketed products. As a result, production models are constantly changed, plants are being decentralized, and raw materials are increasingly being synthesized which, in turn, is requiring the railroads to make rapid equipment adaptations to suit their service to the needs of their customers.

Thus at a time when the demands on railroad service and equipment are requiring a maximum of flexibility and adaptability, the Robinson proposals would impose upon their operations and services an added rigidity of car service rules published in tariff form that "should be enforceable and have uniform application to all railroads" (V.S., p. 127). No one who has any real comprehension of the shape of the forecastable future of this nation's commerce could rationally formulate such proposals. It is hard to conceive how the Commission could do more to cripple the railroads in their efforts to remain a viable competitive element of the national transportation system than to adopt the Robinson proposals.

[54] VI.

Public Complaints and Reported Shortages of "General Purpose" Equipment do not Justify Witness Robinson's Proposals as to Specialized Equipment

I do not mean to suggest that public complaints with respect to car supply or distribution deficiencies should be ignored. But the mere fact that such complaints are raised while the railroads are in the course of responding to the new technology, the requirements of a Viet Nam police action, and the day-to-day needs of the commerce of the nation at the peak of its longest and highest cycle of economic activity, should not be permitted to divert attention from the necessity for acquiring appropriate quantities of the most modern and useful type of equipment that present knowledge will permit to be produced. If railroad equipment was a consumable or short-term investment item, such as a highway trailer, the problem would be considerably less complex and more easily solved. But when it comes

to determining the kind of equipment necessary to replace or supplement the existing national freight car fleet of approximately 1,800,000 units at prices ranging from $15,000 to $35,000 per unit which will have a serviceable life, with 2 classified repairs, of approximately 30 years, the investment involved in relation to the earnings of the railroad industry are of such magnitude that any substantial error can destroy the railroads as viable elements of the national transportation system.

[59] CONCLUSION

The Robinson statement reflects an air of unreality that pervades the entire presentation of the Commission's staff. Although the Commission's order of July 29, 1964, Appendix G sets forth pertinent questions with respect to the complex problem of determining the type and quantities of equipment that the railroads should be acquiring to properly serve the nation's transportation needs and the informational system or systems required to permit the available car supply to be efficiently distributed, none of these questions are dealt with either by Mr. Robinson or by other members of the Commission's staff.

Throughout the Robinson presentation there are the inherent assumptions that (a) the railroads are or should be responsible for all of the ills of the national transportation system and the idiosyncrasies of the National Transportation Policy; (b) the Nation can pursue a policy of fostering gigantic highway and waterway development programs at public expense, of licensing contract and limited forms of common carriage, to use such facilities and of exempting these carriers and others from all regulation when involved in the movement of agricultural commodities or a limited number of bulk commodities without affecting the type of equipment and service the railroads must provide to meet such competition; (c) the Commission in administering the Interstate Commerce Act can require railroads to maintain rate levels [60] that are compensatory according to a recognized cost formula, and that it can inflate such formula costs with peak load equipment requirements without regard to whether rates based on such costs would be competitive with other modes of transportation; and (d) the railroads are responsible for maintaining standby equipment that would protect the nation's commerce from any inadequacies that may arise in times of

war, peak economic activity or which may be occasioned by any lack of capacity in other modes of transportation which the shippers would normally employ if given a choice. These assumptions are made without any regard to the long post World War II record of dismal railroad earnings and the limitation which those earnings have imposed upon railroads' access to the nation's capital markets.

An even more incomprehensible assumption is Mr. Robinson's conclusion that the alleged shortage in "general service" cars can be cured by restrictive rules made applicable to the specialized equipment which has produced the only traffic growth for the railroads in their post World War II history. This assumption is further compounded by his proposal to impose demurrage penalties and service limitations (see particularly Proposals VI, VII and VIII) on railroad shippers using such equipment and that it is within the power of the Commission and the railroads to force the shippers to accept such penalties and service limitations and continue to move their traffic by rail. The fact that this [61] same philosophy, when implemented by the Commission's orders in Ex Parte 104, Part 2, resulted in shippers refusing to accept the higher costs resulting from those proceedings and that a wholesale diversion of traffic from rails to other forms of transportation not similarly regulated ensued, is wholly ignored.

The fact is that the railroads are financially incapable of footing the bill for the total inadequacies that may have developed in the national transportation system as a result of the uncoordinated, inequitable and contradictory transportation policy which has been pursued in this country since the Motor Carrier Act of 1935. Certainly these deficiencies cannot be corrected by further hamstringing the railroads' competitive efforts by prescribing in "uniform" tariffs, the several car service, per diem and demurrage rules proposed by Mr. Robinson.

There are no data of record that will provide support for Mr. Robinson's assumptions. Division 3's assertion that "The problem obviously requires a solution" (323 I.C.C. 48 at 60) does not provide an economic or a legal base for a finding that the railroads must provide the solution. Mr. Robinson has assumed that the railroads are guilty and proposes rules which would insure their economic and competitive execution.

* * * * *

[6] Shipment of owned cars off-line in violation of Car Service Rules would not help the railroad industry nor its freight shippers. To the contrary, it would be a grave detriment to both. Obviously if the New Haven, in violation of the Car Service Rules, were to load its own cars off-line in priority to the surplus of foreign cars continually created by termination on its line, the effect would be this: since the foreign cars must eventually be returned, three-and-a-half-to-four foreign cars would have to be back-hauled empty instead of two-and-a-half-to-three,—for each load originated on the New Haven for shipment off-line,—an increase of 33% to 40% in costly and wasteful empty mileage.

The cross-hauling of empties is a cost which is not balanced by any revenue. A large amount of empty hauling is already necessary because of unbalanced traffic. In fact, of 29.3 billion freight car miles in 1965, 11.4 billion were [7] empty. To the extent that this is not minimized the drain on the industry is increased.

It is obvious that the above considerations are all cogent and of vital significance to the useful car supply. The conclusions stated by Mr. Robinson cannot be ignored if the objective is efficiency of car utilization and adequacy of car supply. The Car Service Rules should be strengthened and implemented as Mr. Robinson and Mr. Reider recommend. Mr. Robinson points out (at p. 123) that improved performance in the placement, removal, movement and prospective loading of cars would have accomplished a total saving of 44,446,370 car days in 1964 and would have overcome the car shortages of that year.

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[19] Norfolk and Western agrees with the elimination of present Rule 1 along with its advocacy of the AAR Car Ownership Formula discussed in its earlier submission herein, and supports continuation of present Rules 2 and 3 but not on a mandatory basis. It is our opinion, based on years of experience with these latter two rules, along with various AAR Car Service Orders, that they are of great importance in obtaining effective car utilization. Compliance with the rules is important, but one hundred percent compliance is virtually impossible on the part of the carriers. A few illustrations will show some of the difficulties involved in attempting to comply literally with these rules:

(1) When a carrier switches empty cars of various ownerships out of a train or from a cleanout track, considerable time and expense would be involved in switching and classifying every car among the various ownerships and placing them for loading at industries according to the proper ownership. We believe that a carrier should make every reasonable effort to place cars at industries according to their destinations, but the expense and time involved in switching a large number of cars in order properly to classify every individual empty foreign car could not be justified.

(2) In some cases an industry will order cars for loading, basing the number of cars on its production capacity without knowing in advance the destinations or routes of the outbound loads.

(3) In some cases empty cars for an industry will be placed on a track above a loading dock and will be moved by gravity to the loading dock as orders are received for cars for loading. In cases of this nature an industry will rarely have a switch engine, and it would not be practicable to switch out cars so as to comply literally with the Car Service Rules in every case.

[20] (4) In some cases an industry will select cars for loading on the basis of the physical condition of the car in relation to the type of lading. For example, a shipper may load several different types of commodities and will order Class "B" boxcars for loading. Upon inspection of the

cars, he may find that a particular car is better adapted to a particular commodity than is another car, although loading the first car would not be in compliance with the Car Service Rules. In a case of this nature, we believe that it would be more desirable to load the car which is better adapted to the commodity, even though such loading would not be in compliance with the Car Service Rules, because such loading would satisfy the shipper's requirements and would in all likelihood reduce the possibility of damage to the lading.

(5) Certain commodities, such as coal and lumber, are tendered carrier on instructions which do not show final destination. For example, shipping instructions on coal often show only a "consigning agent" located at the point where the car is weighed and waybilled. Upon arrival at this point and prior to billing, the consigning agent completes the instructions with the name of the actual consignee, final destination and route. In such cases we do not see how it would be possible to impose as mandatory Mr. Robinson's proposed Rules 1, 2, and 3, or his Rule 4 which is discussed hereafter.

There is an apparent typographical error in Rule 2(b) and 3(c) where reference is made to Rule "5". Apparently the reference should have been to Rule "6".

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Gunderson Statement and Exhibits

[2] I have reviewed Mr. Gunderson's statement and exhibits and find them deficient in the following respects:

1. In both of his car ownership formulae, Mr. Gunderson assumes as a fact the daily freight car shortages as reported by the railroads on their CS-44 reports to the Association of American Railroads. This is an unwarranted assumption. No one familiar with the problem of freight car shortages accepts such reports as evidencing the extent of shortages. The Car Service Division of the A.A.R., to [3] which such reports are made, discounts the reports by 50%, and the railroad industry generally acknowledges that shortages are overstated. In my judgment, even the 50% discount results in an overstatement of shortages. The Gunderson reported car shortages are not supported by any creditable data.

The fact is that no one can accurately state the extent of a car shortage at any time because no one is in a position to demand of shippers just what their requirements are, as between what they have ordered and what they actually need. Because a railroad reports shortages based on shipper orders in no way establishes the validity of the figures reported. Nor does it reflect upon the reporting railroad, which can do no more than to report the excess of car orders over supply. The reporting railroad has no way of ascertaining the extent to which shippers duplicate their orders for cars from more than one railroad, or overstate their orders to obtain a selection of cars or to protect sales which do not materialize. Also, cars may be ordered to protect shipments which may move by other modes of transport. These are matters of which railroad transportation officers are aware, but are unable to specify.

[4] There can be no question but that the CS-44 reports, even though prepared in strict accordance with instructions, can and do overstate car shortages. Just for example, where a country grain elevator may program loading 10 cars per day on a 5-day week basis, and due to local receipts of grain orders 20 cars on Monday, of which 10 are furnished,

and again on Tuesday orders another 20 cars of which 10 are furnished, and so on through Friday when the elevator has loadings for 10 cars, which are furnished during the next working day, the reported shortage for such elevator would be a total of 50 cars, or an average of 10 cars per day, although the actual total shortage for the week was only 10 cars.

Also, it should not be overlooked in this connection that in periods of peak demands, such as in October 1964, other modes of transport are faced with equipment shortages, with the result that a demand for rail cars increases. At such times private carriage by industry-owned trucks is also hampered, creating a demand for rail service. Such transitory demands provide no basis for evaluating the rail freight car ownership, the cost of which must be amortized over the useful life of the equipment, not on a "stand-by basis."

* * * * *

[5] Fourth, Car Service Rules restricting the direction in which cars of certain ownerships could be loaded or moved would be unnecessary and should be changed. The first three Car Service Rules tend to stifle and make ineffective the concept of a national freight car pool. Rule 1, which prohibits the use of owner's cars for interline forwarded traffic if there are other suitable cars available, can result in delaying the return of a foreign car on-line to the owner and at the same time can restrict an owner from forwarding its cars off-line into areas of car shortages, thereby compounding the difficulty of distributing cars in a national pool to areas of greatest need. Rule 2 requires return to the owner of foreign empty cars at a junction with the home road. This rule is restrictive in that these cars at that time may not be required by the owner and in the concept of a national pool should be forwarded to areas of short supply. Rule 3 requires foreign cars to be loaded to or in the direction of the home road or in reverse route from the loaded move. This rule also [6] restricts the operation of a national freight car pool in that cars cannot move to areas of greatest need but are continually moving in the direction of the owner's line even though there may be a surplus of cars in that area at the time.

To illustrate the restrictive effect of these rules, the northwestern roads during grain harvest in late summer receive a number of surplus cars of eastern ownership pursuant to Car Service Orders distributing surplus cars. They are received primarily at the Chicago gateway, a junction with the owning roads, and are moved empty to the grain producing territory for loading (a violation of Rule 2). After loading, the car is moved to a grain inspection point and the grain is sold on the grain market. If the grain is sold and the car is forwarded to a western destination, i.e., Seattle for export, this is a violation of Rule 3. If it is forwarded to the terminal elevators in the Twin Cities or the Twin Ports and is then returned empty for country loading, it is a violation of Rule 3. With the concept of a national freight car pool, cars made available from

the pool for the handling of grain during the harvest season should be used so as to secure the maximum utilization of the available car-days. Rules which result in less than maximum utilization are restrictive and uneconomical and defeat the successful operation of a car pool. An industry receiving loaded cars which are required by them when empty for an outbound load should be permitted to use them for reloading unless they are assigned cars in a cyclical movement or for a specific commodity.

R.V.S. No. 31—R. S. HAMILTON

(Southern Railway)

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[9] When car supply is examined, car surpluses as well as car shortages should be taken into account, lest a distorted view result. Consideration only of gross reported shortages obscures the major role of car distribution and car utilization in adequacy of car supply, and distorts attempted allocations of responsibility for car shortages among individual railroads. One of the flaws in the formulae here proposed and considered below is their failure to take into account local and regional car surpluses. (See p. 38 of my Exhibit A.) In other words, the problem of car shortages is at least as much one of car distribution and car utilization as it is of the numbers of cars owned by the railroads.

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[40] Gunderson goes on to assess a net "ownership" deficiency of 111,042 cars, under his recommended interline car days formula (Gunderson's Exhibit 1). His interline cars originated formula shows a grand total car ownership deficiency of 161,776 (Gunderson's Exhibit 3, p. 10).

In effect, the Bureau says that the railroads should buy over a billion dollars' worth of new cars, under a formula which I show in my earlier statement submitted herein would require the railroads to buy cars to meet peak demands, as it was re-applied. (See p. 23 of my Exhibit A). At the same time, through Witness Robinson, the Bureau advocates imposition of a mandatory set of stringent car service rules and other proposals that would disrupt railroad service and cost many millions of dollars, and which, according to the Bureau's witness, would enable the railroads to meet even peak demands for transportation with the existing car fleet. So, if the Commission took all the advice of the Bureau, the railroads would be compelled to have a car fleet vastly in excess of any conceivable transportation demand. That is unreasonable and unlawful on the face of it. Its propositions about utilization and ownership deficiency do not appear to be stated by the Bureau as alternatives.

[41] At the very least, and absent other considerations, this apparent conflict in the Bureau's case indicates that the Commission should not adopt either the formula of Gunderson or the recommendations of Robinson without additional searching study.

But without regard to contradictions in the Bureau's presentation, it is clear that the Commission should reject Robinson's four major theses and the bulk of his ten proposals, especially those discussed above, in view on the one hand of the lack of evidentiary support in his statement, and on the other of the evidence I have submitted, and that to be submitted herein by the AAR for the railroad industry as a whole. The record does not justify the massive reallocation of the resources of the nation's railroads that the Bureau has proposed.

R.V.S. No. 36—JACK BOWEN

(Union Pacific Railroad)

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[4] First of all, I would like to point out that the Association of American Railroads and the Union Pacific take strong exception to a number of the Car Service Rules proposed.

Regardless of whether revised car service rules are ultimately approved by the Commission, it is my opinion the Commission should not require that car service rules be published in tariff form or otherwise made mandatory on rail carriers. Car service rules govern arrangements between carriers regulating the movement and disposition of the available supply of railroad equipment. These rules have proven to be flexible and can be quickly modified to meet specific situations. If publication in tariff form is required, this flexibility will be replaced by the rigidity of a statute and modification could then be effected only through the procedures provided for amendment of a tariff.

There is no evidence before the Commission that publication in tariff form of car service rules would improve utilization of the existing car supply, alleviate sporadic shortages of cars, or furnish any incentive for augmentation of either the national car supply or the car supply of individual carriers.

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(Union Railroad Company)

[1] My name, business address and title are B. Ralph Gould, Vice President and General Manager, Union Railroad Company, 664 Linden Avenue, East Pittsburgh, Pa. 15112. In my previous statement filed October 14, 1966 in this case, I gave my qualifications, described the Union Railroad and its operations and stated its position in this case.

This statement is in reply to the statement of Charles C. Robinson, of the Commission's staff, who proposed certain mandatory car service rules in his testimony. We have studied those rules and strongly oppose them. The mandatory rules proposed by the staff, or for that matter mandatory car service rules of almost any kind, are unworkable and unrealistic on a switching railroad like ours. Based on our experience in the past, it is our considered judgment that mandatory rules will result in a very considerable increase in cost because of additional [2] switching and a very considerable increase in wasted car days on account of moving empty cars from one point to another for loading or for return to the trunklines. On the other hand, we see no compensating advantage from mandatory rules.

For most of the past two years, the car supply on the Union Railroad has been equal to the demand. Any shortages have been small and of short duration. If conditions develop in the future which require specific action, this can be taken care of by special orders issued by the Commission or by the Car Service Division of the Association of American Railroads.

Most of the cars received on the Union Railroad are of Eastern ownership (PRR, NYC, P&LE, RDG, B&O, WM and B&LE). Except for isolated instances, it has been necessary to use most inbound cars unloaded and supplement these with additional empty cars from the trunklines. When cars released from loading on line are used for outbound loading, there are practically no lost car days other than the time for movement from unloading points to placement. In many instances, cars are reloaded in the same plant where they are unloaded.

Other parties will no doubt analyze in detail the various

ICC staff proposals. My principal point here is that mandatory rules would do extensive damage to our service to our customers, cause great loss in car days, needlessly increase our paper work and require a tremendous increase in switching without any compensating advantage.

We strongly oppose mandatory car service rules as well as the Staff proposals and urge the Commission to reject them.

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[2] We use the railroads in shipping our manufactured products and use rail transportation for the delivery of a large amount of our inbound raw materials, equipment and supplies at our various manufacturing plants. Therefore, an adequate railroad car fleet is of vital concern to us and the Commission's interest in this matter is gratifying. We are cognizant there are many complex problems surrounding car shortages and we, too, are hopeful this proceeding will result in a fully effective solution to this problem. We are, however, particularly concerned with the car service rules proposed by Examiner C. C. Robinson and especially the proposal that they be put in tariff form and that compliance be made mandatory.

[3] We do not wish to unduly broaden the record of this proceeding with redundant statements; therefore, we have carefully reviewed the verified statement presented by Mr. Donald S. Day in behalf of the American Iron and Steel Institute and it should be emphasized we concur with the contents of his statement. We must, however, point out Allegheny Ludlum Steel Corporation is a specialty steel producer and as such does not ship or receive tonnages in volumes comparable to many of the basic steel producers, none-the-less the problems of scheduling our production, packaging and shipping to meet the needs of our customers, is equally complex.

A perusal of the proposed car service rules develops that Rules 2, 3, 4 and 12 are of more direct concern to shippers than the other rules and we shall confine our remarks as to the affect these rules will have on Allegheny Ludlum Steel Corporation.

Our basic steel is produced in open hearth and electric furnaces with cold charges of scrap metal. The scrap metal is usually received via rail in gondola cars from numerous origin points, thereby permitting us to make a considerable number of home cars and foreign cars available for our outbound shipments. Of course, a number of these cars are utilized to destinations other than to home road destinations. For example, during the month of June 1966, our

Brackenridge, Pa. works shipped 151 carloads of steel products to destinations in the United States and Canada. Shipments were made in regular box cars, D-F Type Box Cars, regular gondola cars, covered coil cars and covered gondola cars. Of these 151 carload shipments, home cars and foreign cars were utilized as follows:

Destination Territory	Home Cars	Foreign Cars	Total
Eastern Destinations	40	8	48
Southern Destinations	—	7	7
Midwestern Destinations	—	10	10
Southwestern Destinations	—	2	2
Pacific Coast Destinations	5	16	21
Canadian Destinations	6	39	45
Sub Totals	51	82	133
Destination Unknown *			18
Total			151

* 18 carloads of scrap sold to scrap brokers and cars released to the local railroad agent. Destination and routing supplied to the railroad agent by the scrap broker.

[4] In our opinion, the utilization of cars as they are made empty reduces excessive handling in our plants, assures us of cars to meet our production and shipping schedules, reduces car turn around time and leads to optimum car utilization. Proposed Rules 2, 3 and 4 would prohibit the use of foreign cars. This would require us to place orders for home cars with the origin railroad, thereby resulting in excessive car movements, both within our plants and by the railroads, loss of efficiency and in the end would be a greater contributing factor to the car shortage. As a step toward improved car utilization, we have in the past and shall continue to make a conscientious effort to order cars and handle them as expeditiously as possible within our plants so as to minimize car delays. This action has resulted in a continuing reduction of demurrage charges paid. We have reduced our demurrage charges 55% in 1963, 30% in 1964 and 35% in 1965.

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Proposed Rule 12 states orders for equipment for loading must be specific and [5] must state kind and size of car wanted, number of cars wanted, date wanted, commodity to be loaded and destination and route. It has been previ-

ously mentioned the problems of scheduling production, packaging and shipping to meet the needs of our customers is complex. While we make every possible effort to ship our products on a timely basis, many factors such as unforseeable production failures, metallurgical quality requirements and final inspection procedures can and do delay shipping schedules. It would be unrealistic to order cars anticipating that products will be ready for shipment on a specific date because of the aforementioned possible delays. If cars should be ordered on this basis and cannot be used, it would increase our handling and demurrage costs, increase the railroads handling costs and would further deteriorate the car shortage problem by keeping cars out of service for a greater length of time. We do attempt to control the ordering of special type cars such as DF Box Cars, Coil Cars and Covered Gondola Cars by securing from production schedules the anticipated loading schedule and probable destination areas of orders requiring special type cars. Car ownership is the criteria used to determine where the car will be destined and the route of movement but does not necessarily result in the car being consigned to a destination on the home road. In many instances changes in shipping schedules requires a change in the consignment of the car to a destination within the immediate territory of the home road with the ownership road receiving a line haul movement. Proposed Rule 12 does not permit this flexibility, as a car ordered for a specific movement must be shipped to a predetermined home road destination via a [6] predetermined route and it would be impossible for us to utilize these special type cars as effectively as we do now. I wish to emphasize, the tonnage loaded in these special type cars, represents a relatively minor portion of the total tonnage shipped via rail and we would be unable to predict in advance, accurately or otherwise, the shipping schedules of all rail shipments.

In summary, it is the position of Allegheny Ludlum Steel Corporation that the proposed Car Service Rules, if published in tariff form and made mandatory, would impose unwarranted rigidity on the operations of shippers and railroads, would disrupt our operations without any apparent beneficial results, would create inefficiency and waste motion, would place the railroads at a competitive disadvantage with other modes of transportation and would be contrary to the objectives sought by this investigation.

(American Iron and Steel Institute)

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[2] The iron and steel industry, as represented by the members of the American Iron and Steel Institute, is a major user of rail transportation. Efficient and adequate railroad service is essential to it. Most of its raw material comes to the producing plants by rail and the major portion of its products is shipped by rail. As an industry, it is perhaps the largest user of rail transportation in the country. The adequacy of the railroad car fleet is, therefore, of vital concern to the entire steel industry, and it welcomes the Commission's interest in attempting to develop improved methods of car distribution in order to attain more efficient car utilization and thereby to improve railroad transportation service.

At the outset, it should be emphasized that the basic need is for an increase in the size of the national car fleet.

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[4] . . . Our particular concern is with the car service rules proposed by Mr. Robinson and especially the proposal that they be put in tariff form and compliance be made mandatory. These and other features of the proposed rules will have such seriously adverse effects that we believe substantial modification is necessary.

In the consideration of changes of car distribution practices a primary issue is whether the total car supply of the nation is to be treated as a national car pool, which has been the traditional concept, or whether the problem is to be approached from the standpoint of the need for cars for specific services or for meeting the requirements of individual railroads. The proposals of the Commission's staff are not wholly consistent in this regard in that the car service rules proposed are directed to an effort to restore cars to the owning line whereas, in the evidence of Mr. Robinson, it is stated that a preferred standard for determining the adequacy of ownership is based on car days and not upon cars originated.

The emphasis upon return of cars to owner's rails results in a species of car assignment objectionable for some of the same reasons as the objection stated by Mr. Robinson to

arrangements for assignment of cars to individual shippers. More specifically, the proposal of Mr. Robinson suggests that primary emphasis be placed on the maintenance of the integrity of the individual pools of cars of individual ownerships and that they be available for use by shippers not located on the owning railroad only if the use is immediate and the use aids in returning the car to its owner. Thus, as in the case of assigned cars, the effort is to restore [5] cars to a particular location or area as contrasted with an effort to serve the most immediate need. While the return of cars to owner's rails may improve efficiency, that method should not be followed with such single minded fervor as to result in still greater inefficiency. In any event, the accent in the proposed car service rules upon return of cars to their owners and the routing required to that end is destructive of the traditional concept of a national pool. It is the suggestion of the iron and steel producers that more effective utilization will result if the cars are treated as a national pool and less emphasis is placed upon the prompt return of cars to owners' rails. Undue emphasis upon returning cars to owners' rails will increase the volume of empty car movement, and the complexity of switching services, and will result in overall loss of efficiency. The differences in the car requirements of shippers located on individual railroads are not so great as to justify incurring the loss of efficiency and the enormous expense which would be incident to severe limitations on the use to be made of available cars in order to expedite return of cars to owners after each loaded movement.

As to the specific car service rules proposed by Mr. Robinson, the first four rules stand as a unit; the first three being substantially identical with existing car service rules of the Association of American Railroads. The central theme of Mr. Robinson's proposal is that the rules be rigidly enforced. It is in this rigid enforcement that we think the error lies. It is our belief [6] that only because the present car service rules are not strictly enforced that they work as well as they do. Strict enforcement would so severely impede railroad operations as to increase rather than diminish car shortages. At the same time, rigid enforcement would create extensive frustration, inefficiency and great expense for steel mills—and many other industries—in the handling of their traffic. The service required on steel mill shipments cannot, we believe, be met by the railroads if they are re-

quired to comply fully and inflexibly with the car service rules.

Rigid enforcement of car service rules would be completely frustrating in the shipment of iron and steel articles. This is true in reference to both the present rules and the rules as proposed by Mr. Robinson. The difficulties are inherent in the industries' requirements and we can see no practicable method whereby satisfactory rail service could be obtained if the car service rules were rigidly enforced. It may be that present loading practices at steel mills could be made to conform somewhat more closely to the basic concepts of the car service rules, but full compliance would involve such complicated operations that they cannot be expected to serve the objective of more efficient car utilization.

While individual producers can be expected to describe the effect of the proposals on specific operations, a few general comments as to the character of the industry as a whole will serve to enhance understanding of the difficulties which would result.

The difficulties arise from the ordering, scheduling and [7] shipping practices which are characteristic of the iron and steel industry. Iron and steel articles are generally produced to order and can practicably be used only to fill individual orders. Throughout the industry, individual mills have been built with the expectation that material would be shipped promptly upon completion of production and the plants, the sales pattern and the customer's expectations have all developed in accordance with these practices. Added to these characteristics is the circumstance that steel is distributed very widely. Most steel mills ship to many destinations and it is unusual for them to ship large groups of successive cars to the same destination. For the most part, each individual steel mill each day is shipping to a heterogeneous group of customers shipments of iron and steel articles specifically produced to the individual order of each customer.

This basic pattern of the distribution requirements of iron and steel articles means that it is impracticable to predict the destination and route for individual cars prior to placement or to adjust the shipments ready for loading on any particular day to the ownership of the cars placed on the mill siding. Steel mills can predict with some accuracy the total number of shipments which will be made from in-

dividual mills each day and thus can supply railroads providing service information as to the quantity and kind of cars which it will load. Such information is regularly exchanged, on a daily basis, between the mills and the railroads supplying cars. To attempt, however, to conform closely to the [8] car service rules would impair car utilization, add to the expense of both shipper and carrier, materially reduce the efficiency of both mill and carrier operations and make rail service inadequate to the requirements of the mills. Carriers would be obliged to make a larger number of cars available, the volume of switching operations would be radically increased, the efficiency of the loading operations at the mills would be seriously reduced and many shipments would be seriously delayed.

Production of iron and steel articles is scheduled with great care to obtain the maximum efficiency in operations consistent with the requirements of customers. The scheduling of the operations of a mill is made and adjusted daily and hourly, but the particular pattern of an individual day's activity cannot be predicted in advance. Changes in scheduling, final inspection, metallurgical reports, packaging delays, mill breakdowns, credit restrictions and changes in orders all affect the daily routine and determine the individual shipments which can be loaded into cars on a particular day and the order in which they are available for loading. While predictions of shipments to be made on a particular day could be developed, adherence to any such schedule would be impracticable and if adherence were required to a particular prediction, the result would be that many of the cars placed for loading could not be used, efforts to substitute other cars would interfere with loading operations in progress and the costs of originating shipments would be enormously increased both for shipper and carrier.

[9] In addition to the problems inherent in the pattern of steel shipments, the steel industry and its customers have made substantial efforts in recent years to increase the flexibility of the mills and to reduce the time between receipt of order and shipment. The sales forces, the order procedures and the mill schedules are now organized, with the use of computers and other electronic devices, to be immediately responsive to customer requirements. Mill schedules, packaging procedures, the writing of bills of lading

and waybills, the switching schedule and the entire organization of the firm is now directed to the maximum flexibility in production and shipment. The result of these practices is to make the operations of the mill subject to constant change and to make it impracticable to anticipate the car ownership which will be required for the loading of individual shipments.

Because the mills have made these efforts to be more responsive to customer requirements, in most instances at great expense, it is unlikely that they will be willing to continue their present reliance upon railroad service if it entailed the limitations on their flexibility which rigid enforcement of car service rules would require. Much less difficulty is encountered in connection with motor vehicle transportation. The motor carriers are inherently able to supply individual vehicles more promptly. They handle smaller quantities. The vehicle can more readily be shifted to a new location. In these circumstances a mill or a customer, both of whom are frequently under pressure for prompt transportation, cannot be expected to accept the frustrations, [10] delays and additional expense which would flow from these proposals. It is not an adequate solution to make rail transportation unattractive and thus solve the shortage problem.

Most of the proposed car service rules following Rule 4 are concerned with operations of railroads. This is true of all the rules except Rule 10, Items 1 through 3 of Rule 12, Paragraphs a. through c. of Rule 13, Rules 13a. and 13c. and Rule 15. With those few exceptions, the rules beginning with 5 are totally inappropriate for publication in tariffs.

The basic function of these car service rules is to govern the operating practices of the railroads in the performance of the transportation service called for by the transportation contract. They concern the methods followed by the carriers in the performance of that contract. The present car service rules embody a compact among carriers stating the terms under which carriers share the use of cars. They are, therefore, not a part of the contract with shippers and are hence not appropriate for publication in tariffs.

Shippers obviously cannot control the railroad operations with which these rules are concerned, they cannot have responsibility for complying with them and obviously could not meet any tariff rules based upon them. For example,

it is wholly improper for a tariff to prescribe in detail how empty cars shall be returned to their owners.

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[12] The basic purpose of the car service rules will best be served if they are designated to make that use of any empty car which most promptly places it in revenue service. It is of no value either to carrier or to shipper to move an empty car to meet a distant requirement when the car is needed at or near the location where it becomes available for loading. For this reason, flexibility in the terms and enforcement of car service rules must be permitted in order to attain efficiency in car utilization. Binding, inflexible rules will hinder efficiency rather than enhance it, and are likely to result in widespread efforts to avoid the prescribed rules.

Summarizing, we believe that the central concept of the proposals presented by Mr. Robinson, namely, that car service rules should be rigidly enforced, is erroneous in concept and [13] frustrating and inefficient in result. In attempting to prescribe a single set of rules for universal application to a vast variety of situations throughout American industry, the proposals fail to recognize the need for flexibility and will create much inefficiency and waste motion. They are likely to hobble the railroads in their competition with other modes of transportation. They disregard the dynamism and variety of American industry. An effort thus to make a complex situation conform to a simple set of binding and rigid car service rules will frustrate the very objectives sought to be attained.

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[2] Notwithstanding this, all of our member railroads take exception to many of the car service rules and other proposals submitted by I.C.C. witness Charles C. Robinson in this proceeding on the basis that they (a) would be unworkable, (b) would not improve freight car utilization, and (c) would tend to divert rail traffic to other modes of transportation.

It would seem that the proposed requirement by Mr. Robinson of tariff publication of car service rules was offered in order to make compliance with the car service rules mandatory on the shippers, as well as the carriers. However, car service rules were and have been established by the carriers primarily as a guide for the exchange of equipment, and operationally, as well as economically, can only serve as a pattern for car distribution. They should not be a legal obligation on the shippers or the railroads, and as designed would restrict the carriers' ability to freely obtain a maximum use of their rail facilities for the overall benefit of the shippers and the railroad industry. Many car loading practices are beyond the control of the carrier because marketing and distribution practices of the shipper are geared to their own economic problems, but any effort by carriers or the Commission to interfere with these sound business practices would certainly result in the shippers' employing a mode of transportation better suited to their requirements of [3] competition and profit. Who is to say that a shipper must, at added expense, convey a shipment across the expanse of his warehouse facility to load into a particular rail car, or who would agree that it is operationally feasible for the railroad to switch certain cars to particular platform loading doors to accommodate the best economical advantage of the shipper? Who is to say that the shipper's production schedules, wherein not the slightest conception of car destination is known at the time of loading, will favor rail transportation if such distribution practices are interferred with by compulsory adherence to car service rules? Who is to say that the shipper cannot divert cars to better markets, if such diversions would violate car service rules

which are mandatory? Who is to say that the inspection and grading practices at terminals on grain shipments, resulting in distribution to various consumers and ports in varied directions, could be changed without curtailment of such shipments by rail? In view of these and other shipper problem, certainly any effort to curtail the rail industry's freedom to orient transportation services designed to meet the shippers' needs could only result in loss of traffic to the railroads.

Freedom of car utilization practices must be maintained to meet peak loading demands in various areas, as well as to permit the use of cars that are surplus to the owners in other areas. Under the existing non-mandatory rules, many arrangements are negotiated on short notice to alleviate sporadic car shortages or surpluses, wherein the exchange of empty equipment is mutually beneficial. Only the free exercise of judgment by rail transportation officers can satisfy such shipper requirements, avoid excess empty return [4] movements and accomplish car handling and car distribution with dispatch and economy.

Further, in the field of car distribution, it is necessary to have the proper car at the proper place when ordered for loading. To accomplish this, the railroad industry must operate on forecasts or estimates of shipper requirements. Quite often on short line, as well as trunk line railroads, loading points are far removed from major terminals. This requires the accumulating of cars properly prepared for loading to apply to definite car orders on a prompt basis. Should the railroads be required to have specific or written orders in hand for specific destinations or routes the delay in applying cars would far exceed those now experienced through seasonable car shortages such as those normally experienced in grain harvest areas. Such a mandatory procedure would seriously affect the short lines' ability to perform their transportation function when they are dependent on trunk line connections to provide their car supply requirements.

There are times when the originating carrier does not have a car available to furnish a shipper in compliance with car service rules. The railroads could not maintain their competitive position with respect to other modes could they uphold their obligation to the general public, if they refused to furnish such a suitable car on hand, even though it might

be misloaded, or if they delayed placement for the arrival of a car that could be loaded in accordance with the rules. Also, it would not be possible to accumulate any empty cars at loading stations on a basis of strict compliance with such mandatory car service rules.

[5] The short lines firmly believe that mandatory enforcement of car service rules on both the shipper and the carrier could only cause confusion resulting in delayed shipments; extra and expensive car handling stemming from added switching operations; wasted car days caused by replacing empty cars with other empty cars; one-way movement of loaded cars; and overall lost motion that could only contribute to a lesser degree of efficiency in fleet utilization. Delays and shipper dissatisfaction would far outweigh any advantages that might be obtained through mandatory compliance with such rules. Car service rules as a guide or voluntary method of car distribution and utilization are a very necessary criteria for the handling of empty freight equipment, and the full cooperation of shippers can and should be solicited to curtail any abuses. Freedom to exercise judgment for better utilization and the economic operation of rail facilities must be a managerial responsibility of the industry if the overall benefits to the shipper, the receiver, the consuming public and the railroads are of primary importance and are to be maintained.

Car service powers already prevalent in the Interstate Commerce Commission's authority, along with diligent efforts of the Car Service Division of the AAR, tend to and have relieved the sometimes experienced dislocation of general purpose cars and such shortages aggravated during periods of good economic activity. We feel that this administration of car distribution and utilization is a far better solution to the problem than any mandatory rules which would only add to our transportation problems.

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[10] I now want to discuss proposed Rule 12, and I will deal first with Item 2. While we ordinarily create our own supply of empties for outbound loading from our inbound shipments, occasions occur when this is not the case. Therefore, we must then order additional empty cars. Frequently these are special equipment, but in many, many instances we are seeking additional run-of-the-mill gondola cars. In those situations, it is simply not practical for us to specify the "destination and route" of each and every one of those gondola cars. In other words, suppose we need on a given day 10 gondola cars other than those we make empty. We know we will need that many cars, because we will be producing and shipping that much tonnage requiring gondola cars for its transportation. However, until such time as the car is actually loaded, it is a practical impossibility to know exactly where that car will be shipped. Many cars of iron and steel articles are a mixture of articles such as plates, angles, structurals and reinforcing rods. Individual customers will order a carload of a mixture of these commodities but in varying quantities for each of the different kinds of steel. Until we actually get the car loaded, we don't know whether we will have enough plate tonnage, for instance, to supply the quantity wanted by customer A, customer B or customer C, nor de wo know whether we have available for loading the precise quantity of structural steel desired by customer A, customer B or customer C. The most efficient thing to do, both from our operation and from the standpoint of using equipment is to load that car as fast as possible with whatever product mix we can on a given day and [11] move it out. Unless we do this, we will end up with situations where we can't ship a given car on the day it could be loaded, because we have told the railroad that it is going to a customer in Oklahoma City, and then we don't have enough plate tonnage to complete his order, but we do have enough plate tonnage to complete a similar order for a customer in Shreveport. Under those circumstances, we would have to hold the car we had ordered to go to Oklahoma City for a day or, perhaps, even two and get another empty and start loading it for the customer in Shreveport.

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[3] The Code of Car Service Rules is a part of the Car Service and Per Diem Agreement promulgated by the AAR. The Agreement is published in The Official Railway Equipment Register. Individual railroads become parties to the Agreement by subscribing to it in writing. A copy of the subscribing agreement is attached as Appendix A. At the present time, 408 roads are subscribers to the Agreement. In addition thereto, 52 subscribing roads are reporting per diem direct to freight car owners for 283 short lines. Virtually every railroad in the country is a signature to the Agreement.

The Code of Car Service Rules-Freight prescribes the manner in which freight cars are to be handled, when empty. The Code also contains rules pertaining to the interchange of cars between carriers, light-weighing and stencilling of cars, handling and billing of empty, private tank cars, transfer or rearrangement of lading on freight cars, weighing of loaded cars, detour arrangements, and loading of box cars with contaminating commodities.

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[9] The industry recommends elimination of Car Service Rule 1. One objective of the AAR car ownership formula is to encourage the acquisition of an appropriate number of cars by all carriers, whether originating, bridge, or terminating roads, so that all will participate equitably in satisfying national car ownership requirements. It would be unwise to penalize the terminating lines by precluding them from using cars of their own ownership for off-line loadings because suitable foreign cars were otherwise available. In our judgment full incentive to the terminating carriers to acquire cars is lacking unless those carriers have assurance that they may have the opportunity of loading them for interline movement. This is particularly true if the ownership responsibility is to be measured by their percentage of interline car use. The elimination of Rule 1 was therefore deemed essential if additional car ownership was to be sufficiently encouraged.

The railroads recommend that Rules 2 and 3 be retained

in their present form, but renumbered as Rules 1 and 2. These and other Car Service Rules, however, cannot be mandatory and the Commission's experience with ICC Service Order 978 offers confirmation of this fact.

Reasons why Car Service Rules such as these cannot be made mandatory follow:

Short term exchange of empty cars can be mutually beneficial. A recent example from Southern Pacific practice was cited as illustrative. From time to time, Southern Pacific experiences a surplus [10] of empty cars at various points on its lines in Texas, where at the same time the Santa Fe lines may be experiencing a deficit. At the same time, the Santa Fe may be developing a surplus of empty cars in the lower San Joaquin Valley of California, in the Fresno-Bakersfield area. An agreement will be negotiated, often by wire or sometimes by telephone, whereby a swap of empty cars is arranged; Southern Pacific delivering empties of a designated type to Santa Fe at Texas junctions, in return for empties delivered to Southern Pacific in central California. These cars, made empty at or in the vicinity of the interchange points, are not restricted to Southern Pacific and Santa Fe ownership, and the receiving line undertakes responsibility for further handling in accordance with provision of the Car Service Rules; however, technically there is a violation of present Rules 2 and 3 at the time of interchange. This type of an exchange arrangement obviously leads to better national car utilization by reducing empty car mileage and empty car days. Such exchanges are practical, because they can be arranged without formality in a few minutes, and implemented the same day. It should be pointed out that the [11] need to deviate from present Car Service Rules 2 and 3 may have no predictable pattern or regularity. For example, a military movement to a port may require a large number of cars of a particular size or type, resulting in a large surplus at the port city after the military equipment is unloaded. The transportation officers want to have the freedom of negotiating with other lines in the area to see if they have a need for some of the cars, thereby developing loads for a return movement which would otherwise be made empty to the eastern car owner. Frequently, it is necessary to assemble on very short notice a substantial number of empty freight cars, to accommodate rush movements of military impedimenta. The usual procedure is for the railroad on which the ship-

ments originate to call on its connections for assistance. If insufficient help is received from that source, aid is then solicited from the Car Service Division of the AAR. It is not practicable to observe present Car Service Rules 2 and 3 in such situations. It is the practice of many carriers during periods of car surplus to offer their system cars to other roads or to advise other roads that the latter may retain the cars owned by the former as needed. Under such circumstances, it is not expected that such [12] cars would be loaded in accordance with present Car Service Rules 2 and 3. The Car Service Division of the AAR issues car distribution orders throughout the year, directing the movement of empty cars, without respect to ownership, to sections of the country that are in need of them because of an inadequate supply. This is the quickest way to render assistance, but it does mean that empty cars are handled and will be subsequently loaded without regard to car service rule observance.

Mandatory observance of present Car Service Rules 2 and 3 assumes that cars are always needed on the owners' rails. This is not true most of the time on predominantly terminating carriers, and some of the time on predominantly originating carriers. When cars are not required on the owners' lines, there is no need that they be handled in accordance with car service rules, if there is a need for them by non-owners. This will become an increasingly important factor, as cars are acquired in accordance with the car ownership formula. A probable future development is a plan whereby the Car Service Division of the AAR will be able to inform all carriers of the ownerships that are not required at home and which can be temporarily used without regard to observance of present Car Service Rules 2 and 3.

[13] There are some commodities that move in a manner that makes it impossible to conform to present Car Service Rule 3. Grain is a good example. It may be billed from a country elevator to a terminal in an eastwardly direction within the State of Kansas, which would mean that an eastern ownership car could be provided with assurance that it would be loaded in accordance with Car Service Rule 3. However, after inspection and grading at the terminal, it could be billed to a Gulf Port or an interior terminal in Texas for actual unloading, which would be a violation of Car Service Rule 3.

In connection with the foregoing change in Note (C), recommended by the ICC Staff, the carriers are unalterably opposed to this change. First, in explanation of present Note (C), it should be understood that its purpose is to provide relief if, through observance of Car Service Rules (present Rule 3 in particular), a carrier is required to haul empty cars excessively long distances, as compared to the loaded haul. This is what is meant by the word "inequities" in present Note (C). There are not many instances where "inequities" of this type occur, and it has not often been necessary for the carriers to invoke the provisions of Note (C). [14] Therefore, it should be understood that present Note (C) is relatively unimportant. The ICC Staff now recommends that when cars are not handled in compliance with Car Service Rules, authority must be secured from the Car Service Division of the AAR and must be approved by the ICC; also, that requests for exceptions must be in writing and must contain a full statement of the need for the exceptions. When approved by the Commission, such exceptions shall be published in tariff.

There are presently many special orders or Car Distribution circulars that permit or direct the handling of empty cars outside of the scope of the present Car Service Rules; for example:

(a) Special Car Order 90 governs the routing of empty ordinary boxcars of AAR mechanical designation "XM" and its provisions supersede the provisions of Car Service Rule 3. SCO 90 has been recognized in the industry as a so-called "direct home route boxcar plan" and has been in effect many years and its purpose is to more expeditiously return empty cars to owners without circuitous routing which would be required under Car Service Rule 3.

(b) CSD 145-U again supersedes the provisions of Car Service Rules 2 and 3 and is applicable to the entire gamut of specially equipped cars of the many mechanical designations, as outlined in the circular. Basically, its provisions provide for empty return in reverse of the loaded route.

[15] (c) Circular CSD 435 has essentially the same provisions as 145-U, except that it is applicable only to covered hopper cars.

(d) Circular CSD 526, limited to open top hopper cars,

used in unit and volume coal movements, again provides for the specific empty return of such cars, again in the exact reverse of the loaded movement.

(e) Circular C-411, applicable to ownerships of specific railroads and applicable to only open top hoppers, covers the manner in which such empty cars shall be returned to the owner.

(f) Circular 463, applicable to open top hoppers of one ownership, governs the disposition of such cars when empty.

(g) Circular CSD 199, applicable to per diem freight cars released empty on carriers serving the State of California.

Other exceptions are the reciprocal mileage agreements, which basically provide for reciprocal handling of out-of-route cars that home routes are not available for or are not worthwhile developing. Therefore, carriers agree among themselves to handle cars for each other, maintaining a record of the cars handled, and mileage, in order to keep the handling equitable.

Present Car Service Rule 5, whereby cars may be short-routed by agreement among the carriers involved, permits a departure from present Car Service Rule 3.

On preceding pages of my testimony, I mentioned several examples of the need to deviate from [16] present Car Service Rules 2 and 3 on a day-to-day basis, in the interest of efficient utilization and economical operation or to accommodate emergency situations. Many of these arrangements are negotiated by telephone and put into effect immediately. The nature and extent of the day-to-day agreements among the railroads are probably little understood outside of the railroad industry. These arrangements are often prompted by spot shortages in which immediate cooperative action by all roads in a position to help is desired, or by the sporadic appearance of car shortages and surpluses, in such a manner that short term exchanges of empty cars can be mutually beneficial.

As I have noted, many of the conditions which give rise to the need to deviate from present Car Service Rules 2 and 3 often have no predictable pattern or regularity, and usually must be dealt with quickly. The exercise of judgment and initiative on the part of transportation officers should be encouraged, not stifled. Railroad transportation

officers have the obligation not only of satisfying shippers' requirements, but also of seeing that car movements are handled efficiently; that waste is kept to a minimum; that empty return movements are avoided, if possible; and that the [17] entire practices of car distribution and car handling among the railroads are accomplished with dispatch and economy.

The carriers believe that Note (C) as proposed by the Staff is not practical and, if adopted, would be a very serious handicap to the railroads in fulfilling their car supply obligations to shippers, and in the efficient utilization of empty cars.

Proposed AAR Car Service Rule 3 (Present Car Service Rule 4)

This rule reads as follows:

> Cars of railway ownership must not be delivered to a steamship, ferry, or barge line for transportation by water, except for transportation in interstate commerce by common carriers by water between points within the continental United States (not including Alaska), without permission of the owner filed with the Car Service Division.

Change is not contemplated.

Proposed AAR Car Service Rule 4

This proposed rule would read:

> "Each originating carrier must use reasonable diligence to see that foreign cars are loaded or handled in accordance with provisions of Car Service Rules."

The industry recognizes that there has been much nonobservance of car service rules over the . . .

* * * * * * *

[21] There will be times when the originating railroad will not have a car available which can be furnished to the shipper in compliance with Car Service Rules. The option then is to furnish the shipper another car, with the knowledge that it will be misloaded, or wait until a suitable car can be made available. Faced with this problem, most railroads will, in order to protect the shipper's loading requirements, furnish another car. What is not generally known is that in the case of specially equipped cars this is

often done with the concurrence of the car owner, on the understanding that the originating line will arrange to furnish a car of its ownership for the next load the shipper desires to route over the line of the appropriated car's owner.

Another point which may not be fully appreciated is that many areas draw their car requirements from a central terminal. It is not feasible to keep a [22] supply of cars at each loading station, hoping that someone will order them and in order to have cars instantly available. Instead, empty cars are allocated from central terminals to shippers in a defined radial territory. In order to meet shipper requirements, but in the absence of specific knowledge of the destinations subsequent to loading, it is not possible to be selective in the assembling and moving of empty cars to loading stations, on the theory of literal compliance to Car Service Rule 3.

Some commodities are shipped in volumes of 200 or more cars daily from a single loading station. It would not be possible to have sufficient switching service to supply empty cars, in a manner that would assure literal compliance with Car Service Rule 3; and, in addition, in instances of this kind the shipper usually could not load cars in literal observance of the rules, even though foreign ownerships were supplied by the originating carrier with that intent.

The cases in which the shipper finds that the sale has been frustrated, an order diverted, an unsuitable car furnished for loading, or cars improperly spotted, represent the exception rather than the norm. [23] It is the view of the carriers that efficient railroad operating practices must recognize the practical necessity for a certain amount of misloading as incidental to the efficient conduct of railroad business. The alternative means, not only an angry receiver and a furious shipper, but the loss of car days, substantial expenses and lost motion of switching the car out of the shipper's plant empty, locating a suitable car, and switching it back, with quite possibly a special switch being arranged in order to spot and pull the car in time to make necessary connections.

The complete elimination of shipper's misloads can be accomplished only at prohibitive expense, and it is the considered judgment of the industry that the carrier's correct emphasis should be in (1) soliciting the full coopera-

tion of shippers to do their part and in (2) placing cars which can be correctly loaded in accordance with Car Service Rules. The proposal that the railroads be precluded from accepting cars which have not been loaded in accordance with Car Service Rules—leaving aside the disruptive effect which such a rule would have on the roalroads in their relations with shippers, simply does not appeal to us as a sound rule from an operating standpoint. On the contrary, we [24] believe that the confusion, lost motion, delayed shipments, wasted car days, and extra car handling which would ensue, would far more than outweigh any benefits which might be achieved.

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[3]. Bethlehem Steel Corporation has encountered difficulties in obtaining an adequate supply of railroad cars of much the same sort as that experienced by other steel producers and many other shippers, including shippers of grain and lumber. In Bethlehem's case, car deficiencies have involved primarily general purpose cars and, among general purpose cars, the primary problem has concerned gondola cars. Special purpose cars involve circumstances different from those affecting the distribution of general purpose cars. They are distributed as necessary to meet specific situations.

* * * * *

[5] The Bethlehem Plant is served by the Reading Company and the Lehigh Valley and, by trackage rights over the Reading Company, by the Central Railroad of New Jersey. The Gunderson exhibits show surpluses for gondola cars in the case of the Lehigh Valley, minor shortages in the case of the Central Railroad of New Jersey and somewhat larger shortages in the case of Reading Company. The Reading Company owns about 4,000, the Lehigh Valley about 2,200 and the Central Railroad about 1,000 gondola cars.

Bethlehem does not believe that it is practical to expect these carriers to provide an adequate supply of cars under any foreseeable conditions or under any reasonable car supply formula. An adequate supply can be provided only if connecting lines furnish cars in substantial numbers. The plant generates few gondola cars from inbound loads. These are relatively short-line carriers and only a small proportion of the shipments move to destinations on their lines. A review of shipments in March, 1966, showed seven percent as delivered to destinations on the Central Railroad of New Jersey, about nine percent to destinations on the Lehigh Valley and about seventeen percent to destinations on the Reading. Thus over two-thirds of the shipments move to destinations beyond their lines.

* * * * *

[7] It is our impression that there is no supply of gondola

cars in the area which can practicably be returned empty to owners' rails. The need for such cars in the area is too immediate and compelling for such home routing.

It might be suggested that closer compliance with car service rules would result in increasing the number of home cars on the lines of Reading, Lehigh Valley and Central of New Jersey, so that their ownership would more fully meet the requirement. We believe that even were that happy result to occur, these railroads would nonetheless require extensive help from their connections and that the effect of compliance with car service rules would be merely to widen the area from which cars must be routed empty in the direction of these railroads. It is likely that the result would be merely one of cross-routing empty cars to the detriment of everyone concerned.

These circumstances affecting the operations of these railroads seem to us to make it impracticable for them to provide a service whereby the plant could load cars in compliance with car service rules. Chronically there are insufficient cars available, even with extensive communication between Bethlehem and these railroads and their connections. On occasion the mill has been able to maintain continuous operations only by resort to shipping by motor carrier, frequently at a rate penalty, material which would have moved by rail had cars been available in adequate numbers. These changes in routing have affected not only material moving between Bethlehem plants but also have involved [8] materials moving to customers. Despite these efforts, the mill has, in every month of this year, been delayed in shipping material due to the circumstance that cars were not available for loading. There is no known source of additional cars. Even if a sufficient supply of cars could be maintained in the Bethlehem area, the problem of switching cars so as to provide cars of appropriate ownership at the right place at the right time would become insuperable.

The proposal, moreover, seems to contemplate that empties shall be forwarded off line if not loaded within 24 hours. This portion of the proposal would, therefore, make it impossible to retain cars in the Bethlehem area in a supply adequate to permit placing cars of an appropriate ownership. Indeed, in these circumstances, the proposal would suggest that railroad and plant operations be controlled with such accurate timing that cars of particular

ownerships be moved to Bethlehem and placed for loading on the particular day that all the items comprising a shipment to a particular destination have been completed and the shipment is ready for loading. Operations of this character are impossible.

In addition to railroad difficulties in assembling cars in the manner suggested is the circumstance that the mill cannot predict in advance the destinations to which material will be available for loading and hence could not provide information which would permit the railroads to place cars for loading so as to comply with car service rules.

[11] The mill is equipped with a variety of sets of rolls each of which is used to produce steel of a particular cross-section. To minimize the delay and expense of changing rolls, the mill runs material of a particular cross-section in the volume necessary to fill all orders on hand for steel of that cross-section. The mills at Bethlehem roll 136 different cross-sections of 467 different weights. The customer normally orders pieces of several different cross-sectional dimensions, different lengths and different weights, so that the several pieces comprising each order are produced at different times and material is stored until all items in the order are completed. As a result, the total volume of steel in inventory at the mill at any one time amounts to approximately ten times the quantity shipped each day.

These characteristics of the production of structural steel complicate the problem of complying with car service rules because the individual pieces comprising each carload must be individually identified from a great mass of material. To minimize confusion in the yard, efforts are made promptly to load all material available for shipment during any individual shift. Decisions as to the particular cars to be used for particular materials must, therefore, be made currently. Advance scheduling of the loading pattern to be followed on any particular shift can have only limited utility. In practical terms, the choice of the car or cars to be used for a shipment must commonly be made by choice among the cars or car sets then available on the yard tracks.

The third sort of difficulty in this situation concerns the [12] problems of the yard in assembling material and loading it into cars. Several times each day the yard receives information from the production scheduling department showing the material which is available for making up

individual loads, these reports being issued as the final material for each order is completed and all work on each piece has been finished. Normally, information as to approximately half the loads made up each day is available to the yard in the morning and information as to additional loads is received during the day. The yard then has responsibility for determining the equipment necessary for each load, ordering proper equipment for each load, identifying the several pieces comprising that load and loading the material into the car. While, as to any individual car, the material to be loaded will normally be found in a particular area of the yard, it is frequently necessary to search for individual pieces because, in the re-handling necessary to remove particular pieces from larger piles, some material can be misplaced.

The yard issues placement orders for cars or sets of cars generally in conformity with its information as to the physical characteristics of individual loads available or likely to become available. 65-foot cars are at a premium and, therefore, their use is reserved for loads containing material which cannot be loaded into shorter cars.

The operations of the yard are thus highly complex and present performance standards can be maintained only by the trained ingenuity of the supervisors. In theory at least, if the loading crews could program their work in advance, if the railroad switching crews had available a supply of cars adequate to permit them fully to meet the [13] terms of the car orders and if they had adequate time to perform the switching necessary to seek out particular cars of particular ownerships required by the yard, the yard would be able to match particular carloads to cars of approximate ownerships as ordered specifically for particular orders. In fact, such operations are impossible. The car supply is not adequate to the purpose and there is insufficient time to perform the complicated switching which would be necessary. A requirement to load each shipment into cars previously ordered specifically for that shipment would necessarily create confusion in the operations of the yard, force more frequent transfers from one craneway to another and would result in delays which would make operations of the yard, already very complicated, impossible.

As a practical matter, the switching line cannot practicably fulfill car orders were they to include a requirement

to comply with car service rules. As a result, the yard must determine the particular cars to be used for particular loads after the cars have been placed, based on the judgment of the loading crews as to which cars or which sets of cars are placed in a location at which the entire order can be assembled in the car. If an attempt were to be made to load cars in conformity with car service rules, many of the cars placed could not be used, simply because there would be no materials available for loading a car at the location where that car was placed so as to permit it to be routed as required by car service rules. The tracks would require much additional switching. The additional switching would interfere with the operation of the yard and both the railroad and the yard would incur much additional expense.

[14] In an effort to determine the extent of the observance of car service rules in this yard, we made a study of operations during the period March 1 to March 5, 1966. That study showed that forty-eight percent of the cars loaded in the yard were loaded in compliance with car service rules. From this information, we attempted to recast the operations of the yard to determine whether it would be possible for the yard to have loaded the same material into cars in conformity with car service rules. In making this analysis, it was assumed that all the cars loaded during each 24-hour period were available to the switching crews for placement at the beginning of and throughout each day and that the railroad had in fact placed the cars at a time and place which would permit loading in compliance with car service rules. Even under these circumstances, it was found that only seventy-eight percent of the loads could have been placed in the cars in compliance with car service rules. In actual practice, this result could not be realized because, in the normal operations of the yard, the railroad does not have available at any one time all the cars loaded during the day. Since the railroad is unable to respond to orders for cars either in the number or characteristics ordered, the loading crews must utilize such types of cars or combinations of cars as are available at the time the cars are placed.

For the reasons previously stated, we do not foresee any possibility that the railroads serving this plant can hope to supply cars for its use in quantities necessary to permit the switching line precisely to place cars of an ownership suitable to the destination [15] and route of a particular ship-

ment and even if such a supply of cars were available, it would not be practical for the switching line, within the time available, to perform the complicated switching necessary to meet orders for cars of particular ownerships. We know of no possible way in which this operation could be performed if the yard were obliged to operate in compliance with car service rules.

Somewhat different procedures are followed by the plant in handling material for shipment by truck. Most trucks are not loaded at the main shipping yard but at an auxiliary yard to which the material is carried by straddle truck. Trucks are, however, individually ordered for individual loads. This operation is practicable because individual trucks can readily be positioned at the particular loading location where they can most readily be loaded. As necessary, they can readily be shifted, individually, to another location. The volume handled is much less, the quantity loaded to individual vehicles is less, the time between the order for trucks and their placement is shorter, and the motor carriers are more frequently able to supply the equipment required to carry shipments of particular characteristics.

The major distinction, however, between the loading of trucks and the loading of railroad cars is the inherent flexibility of the vehicle, including the opportunity to move it directly to the location where the material is to be loaded without interfering with other loading operations. In other words, the motor vehicle equipment can be individually moved to the precise location most convenient to the loading crew, whereas in the rail situation, the entire track, regularly [16] involving ten to twelve cars, must be switched at one time and there is much less opportunity for placing cars of particular ownerships at particular locations without creating intolerable delays in the loading operations.

Somewhat similar, though less complex, operations are involved at plate mills. As in the case of the structural mills, plate mills produce particular pieces of steel of particular dimensions having a particular metallurgical composition in particular aggregations responding to individual orders. The same delay occurs between the time of the production of the first piece for a particular order and the production of the last piece for that order. The product is shipped in individual carloads throughout a wide area.

An explanation as to why it would be impossible for a plate mill to load cars in compliance with car service rules can be made by considering the operations at our Burns Harbor Plant. The plate mill there is probably the most modern of any in the United States, the mill being a completely new mill which began operations in December, 1964. The mill has a rated capacity of 60,000 tons of plates per month. The plant is served by the New York Central and all railroad operations at the plant are performed by that railroad. The plate mill is served by two parallel loading tracks with space for 35 cars. Empties are ordered by particular car lengths or combinations and the material available is then loaded into the cars.

The loading crews at the Burns Harbor plate mill are, if anything, under even greater pressure for time and space than are [17] the loading crews at the structural yard in Bethlehem. The area required for storage, sorting and shipping plates is enormous; even the 150,000 square feet available at Burns Harbor has proven to be far less than would be desirable. Because the flatness of plates is of major concern to customers, plates are stored flat on the mill floor and limitations must be observed in piling one plate on top of another. Under these conditions, the loading crews quickly exhaust space on the shipping floor. Consequently, the crews are under intense pressure to move material off the floor into trucks and cars. Under these circumstances, predictions as to the material to be loaded on any one shift must be made hourly, depending upon the progress of the rolling of the materials.

The loading crews have information as to the material being rolled on the mills, but there are frequent interruptions on the rolling process and frequent instances where particular plates are delayed for special processing or testing, so that there is no possibility of predicting the destinations to which material will be loaded during any particular shift. Under such circumstances, it is impossible for the mill to develop information as to the destinations of the cars being loaded during the day, so as to permit instructions to the switching crews as to the car ownerships which should be placed at any one time. Cars must be loaded immediately with materials then ready for shipment.

To determine the extent of compliance with car service rules at the Burns Harbor Plant, we made a study of its

loading operations during the period October 6 to October 20, 1966. The [18] study included only the loading of plates into gondola cars for shipment to customers. That study showed that 41.2 percent of the cars were loaded in compliance with car service rules. On a reassignment of the loads to other cars, assuming that all cars placed during any 24-hour period were available for loading continuously throughout the day and so placed as to permit loading in compliance with car service rules, compliance could have been increased to 64.6 percent. These results show that the Burns Harbor mill would find it impossible, for practical purposes, to load in compliance with car service rules.

Even if the loading crews had information as to the particular loads which were to be made each day and the destination of each load could be supplied to New York Central so as to permit it to respond to car orders with cars of particular ownerships, the result would be a great increase in the number of cars New York Central would require to respond to such orders and thereby the purpose of the program would be defeated. Furthermore, the procedure would greatly expand the amount of the switching necessary to respond to such orders. Even if it were practicable for the New York Central to maintain an adequate supply of empty cars so as to permit it to respond by placing cars of particular ownerships in accordance with the destination information supplied by the mill, the delay and expense incurred in assembling cars in response to orders of this sort would be self-defeating and would immeasurably interfere with the work of the loading crews. In summary, we know of no practicable way in which a plate mill, even so modern as that at Burns Harbor, could comply with car service rules.

[19] The difficulties involved in complying with car service rules at steel mills other than structural and plate mills are less severe and are believed more closely to approximate the problems of industry generally. The movements of steel products such as sheets, tin plate and wire tend to be more concentrated among fewer destinations and to follow more predictable patterns. The car supply situation is not as severe because the material moves to a greater extent in special purpose cars and there are lesser difficulties in aggregating the material intended for particular shipments

so that materials can be moved more promptly from the mill into the cars.

In the case of these products, accordingly, compliance with car service rules, although difficult at any time, would become impossible at times when insufficient cars were available and at times when a rush shipment developed during the day and it became difficult or impossible to place a car of appropriate ownership for loading within the time required to complete loading in order to accommodate a particular delivery requirement. While these difficulties are less complex than those in connection with plate and structural mills, they are, nonetheless, highly significant and would in themselves be sufficient, we believe, to show that a requirement for observance of car service rules is impracticable.

In summary, we believe that compliance with car service rules under present or foreseeable car supply conditions, is impossible and impracticable, that it would result in increasing dramatically the inflexibility of railroad service and make it much less responsive to the needs of commerce, that it would add measurably to the expense [20] incurred by the plant in loading cars; that it would significantly increase railroad switching expense, that it would result in much poorer rail service and that it would markedly increase the relative advantages of shipment by motor vehicle.

We believe, further, that the proposal would be self-defeating, except in the rare instance where the origin line could itself provide all, or substantially all, of the cars to be loaded from cars of its own ownership. The difficulties inherent in supplying cars of particular ownerships for particular loads would require a substantial increase in the cars held awaiting orders for placement, particularly since steel mill products are widely distributed from a limited number of origins and a large proportion of the transportation is over the lines of several railroads. In practical terms, in many instances, as in the case of our plant at Bethlehem, Pa., there is no practicable prospect that the origin lines could supply an adequate number of cars.

Our experience in obtaining an adequate supply of cars for our plants also suggests that the proposal is wrong in theory. It seeks, in effect, to create individual pools of cars for use by each railroad and to require that the rail transportation service throughout the nation be reorganized to

achieve that objective. Our experience suggests that the better means of attaining an adequate and efficient transportation service is to treat all cars as a part of a national car pool, moving cars to the nearest point where they are needed and not to embark on a program of operations whereby each ownership would be treated as a separate supply of cars assigned to the needs of shippers on each railroad.

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[2] *Proposal 2*—This proposal would establish a new set of car service rules to be filed as a tariff on behalf of all railroads. The proposed rules are included as an appendix to Mr. Robinson's statement. Rules 2 and 3 which generally provide that cars shall be loaded to, via, or in the direction of the owning line, do not constitute a significant departure from present practice. However, rule 4 would prohibit acceptance from shippers of cars loaded in violation of rules 2 and 3. Witness Robinson proposes that each of these rules be made mandatory.

It is not necessary to publish car service rules in tariff form in order to provide shippers, receivers and carriers ready access to them, for such rules are already published by the A.A.R. in the editorial section of the Railway Equipment Register. The register is currently on file with the Commission and is standard equipment in most traffic departments. Apparently the purpose of the proposal is to make any departure from the rules an unlawful act punishable by fines, thereby discouraging violations of the rules. It would probably accomplish this objective, but at too great a price. We submit that publication of car service rules in tariff form would cloak them with a rigidity that would frustrate the efforts of conscientous carriers and shippers and ultimately discourage the efficient utilization of equipment.

We agree that the railroads should voluntarily adopt and generally be guided by uniform car distribution rules and practices. However, there are times when the carriers and shippers at regional and local levels, with the use of sound experience-grounded discretion, can more effectively cope with the diverse problems incident to local car shortages than anyone else. Exercise of this right of judgment would [3] be precluded by publication of rules in tariff form.

The proposed removal of all flexibility in the rules thus defeats their very purpose. Consider coal. That industry, has by long established custom, loaded a portion of its production into cars before the actual consignee is known. This practice materially reduces handling by producers and

carriers alike. Coal shippers are entitled to assume that the cars furnished them may be loaded for movement in accordance with this long established and Commission approved business practice. To place upon the coal industry the unconscionable burden of determining the direction in which each car must move would benefit absolutely no one; on the other hand it would bring about increased cost to both shipper and carrier and result in needless waste of car days.

In addition to the mandatory and specific rules he advocates, Mr. Robinson would authorize carriers to include in the proposed car service tariff additional rules of their own. A concession that additional rules might be required is tantamount to an admission that the present code of A.A.R. Car Service rules—rules which have been constructed out of countless man-years of actual experience—reflect conditions beyond the ken of any one man. Obviously they should not be changed upon the unsupported recommendation of one man—with or without experience.

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R.V.S. No. 64—Richard Haupt

(Ford Motor Company)

[1] This statement addresses itself to the verified statement of Mr. C. C. Robinson, Safety and Service Agent, Interstate Commerce Commission, dated July 1, 1966, and in particular to the proposed Code of Car Service Rules contained in Appendix "A" of his statement. Specific comment is directed toward the impact of these rules on assigned car fleets in the service of shippers, such as Ford Motor Company.

The evidence and testimony presented by various witnesses in this proceeding to date indicate the existence of a long-term national freight car shortage, and also indicate that some kind of corrective action may be required to prevent a worsening of this condition. Ford is concerned, however, that Mr. Robinson's proposed Car Service Rules may not be the appropriate corrective action.

* * * * *

(Grocery Manufacturers of America, Inc.)

[3] Over the years the GMA Traffic Committee has been concerned with the impact on the grocery industry of the shortage of rail cars as well as the inadequacies in rail service. These matters have been major subjects of discussions at our meetings for as long as I can remember. Furthermore, about 1960, it became evident the plain box car was becoming an inadequate vehicle for transporting the large increase in grocery shipments consisting of mixed carloads of groceries of various descriptions and package sizes. Damage to our products was increasing at an alarming rate. Plain box cars, without load restraining devices, seriously limited industry's ability to ship grocery products in unit or pallet load quantities because the units could not be restrained in the car. Thus, the industry and the carriers were prevented from reaping the many benefits of the improved handling techniques on which carriers, shippers and receivers had been working.

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[10] GMA is concerned that from this investigation there may evolve rules which will prejudice and operate against the development of the kind of freight car which the dynamic grocery industry demands. We are concerned about the recommendation that heavy investment by the carriers be made in plain box cars, which from our point of view does not appear to be the solution to the current shortage. Building plain box cars is not a satisfactory response to the needs of the grocery trade, nor to the needs of many other large segments of the American economy. Serious and important economic considerations are at stake, and any orders of the Commission requiring heavy capital investment must of necessity have an effect upon carriers and the general public for years to come. Railroads are now benefiting from greater participation in the hauling of grocery traffic due in large measure to the development of GMA Cars. We believe the freedom with which the shippers and carriers have been able to develop rail equipment from which both have benefited, must be continued and encouraged. At the same time we are faced with a chronic shortage of equipment and

make the point that improved service and adherence to scheduled movement will result in substantial increases in car availability without additional capital investment.

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[2] Taken as a whole, the proposed rules would by their mandatory increased restrictions aggravate the inconveniences and symptoms of freight car shortages instead of alleviating the fundamental problem; namely, that there simply are not enough available freight cars to meet the demand. Instead of affirmatively attempting to encourage increased freight car production and acquisition by the railroads and improve freight service, the proposed rules take the negative approach of imposing more severe restrictions and penalties on shippers.

The Gypsum Industry Needs Fast Service:

Gypsum products include various building materials and other products manufactured from gypsum rock. Gypsum wallboard represents the greatest tonnage. Throughout the years the gypsum industry has worked with the railroads to enable low-cost, large-size carload shipments to be the standard method of distribution in most building materials markets throughout the United States. This, however, is being greatly challenged within the last few years with truck distribution gaining increased popularity in many areas.

Competition in the sale and distribution of gypsum wallboard is keen, and a major factor in sales is the ability of the manufacturer-seller to render prompt [3] service to dealer-customers. Quick delivery following placement of an order has become particularly important in today's market because of the trend to smaller inventories by the building material dealers. Shipment of an order on the date of receipt, or the following day, is now the rule rather than the exception whether the transportation is by motor carrier or rail.

The necessity of immediate availability of adequate freight car capacity is apparent when it is appreciated that many gypsum plants ship hundreds of cars each month, and several plants ship nearly 1,000 cars per month. The remote location of many plants, adjacent to deposits of gypsum rock, means that they may be situated on branch lines, or in areas, many miles from transportation centers where empty freight cars might otherwise be readily available.

Present Restrictions Have Been Ineffectual:

The shipping public generally, including the gypsum industry, has been seriously handicapped over the years because of the recurrent inability of railroads to furnish sufficient freight cars to meet shipper demands. To some extent efforts by the railroads to alleviate particular car shortages have been successful, at least temporarily in particular locations. However at times the chronic shortage of freight cars continues, and becomes particularly acute during heavy seasonal shipping periods.

[4] Unfortunately, recent additional efforts by the railroads have involved new penalties against shippers, such as increased demurrage charges, reduction of free time for loading and unloading, and unilateral increases by the railroads in carload minimum weights and the imposition of more restrictive routes. While imposing additional burdens on shippers, none of these efforts has contributed significantly to increased freight car capacity.

Proposed Rules Will Create New Hardships:

The proposed rules will add new penalties for shippers, and will not increase the availability of freight cars.

Under the proposed rules loading of freight cars by shippers would be severely restricted since it would become necessary to take into account such irrelevant factors as destination, car ownership, and routing. Instead of freeing the flow of freight cars in interstate commerce by making their use more flexible, the proposed rules would introduce new rigidities in freight car utilization.

Because of the short lead time, as above noted, between order receipt and prompt shipment, it is not usually possible in advance to order specific equipment for a specific movement. Thus, while equipment must be ordered in advance, the plant is without specific knowledge [5] of where shipments will be destined, the route of the shipments, or the railroads to be used.

If railroads are to be competitive with motor carrier distribution of gypsum products, the shippers cannot be tied down with extremely restrictive rules as to use of railroad equipment. Where motor carriers are used, one or two specialized carriers have sufficient equipment readily available adjacent to the plants which can be used throughout the distribution area. The railroads must meet this competition.

Conclusion:

The Commission has formally recognized the fundamental fact that ". . . there is no uncertainty as to the major reason for these recurring shortages. The national car supply has dwindled to a new low. . . ." *Ex Parte 241* (323 ICC 48, 50).

We submit that if the proposed rules were to be published in tariff form, so as to be mandatory on railroads and shippers, the freight car shortage would be worsened. For example, any tariff provision such as that proposed by Rules 2, 3 and 4, which prevents a shipper from reloading a car that had been received loaded inbound and requires the railroad to move the car empty to another loading location will not lessen the car shortage. The same rules could also force shippers to use routes that would increase transit time. These proposals not only fly [6] in the face of common sense consideration of efficiency, but would also compound existing admitted shortages.

While diversion of traffic from railroads would lessen the car shortage, we doubt the situation requires such a drastic remedy.

The proposed rules which would place almost the entire burden of shortages on shippers should be rejected by the Commission because they avoid the problem rather than meeting it head-on.

* * * * *

[2] INLAND STEEL COMPANY'S INTEREST AND CONCERN

Inland recognizes the need for the efficient utilization of railroad equipment and assumes an obligation to use it effectively and at the lowest practicable cost. We are aware of the consequences of car shortages for we have experienced them. We know that they cause loss of production, unnecessary material handling costs, disappointed and dissatisfied customers.

While we are never content with car shortages, we do recognize that many railroad companies have been building and purchasing large numbers of new cars to alleviate such shortages. We recognize also that shortages are most likely to occur during periods of high economic activity. Shippers, for the most part, then attempt to solve their problems through innovations which are greatly dependent [3] upon flexibility, and flexibility in turn depends upon a broad range of car choices which is made possible, largely, by the inherent characteristics of the national car pool concept.

Admittedly, this concept is not perfect. While it functions reasonably well during periods of non-peak economic activity, it does not always meet the nation's needs. This Commission then endeavors to alleviate the worst symptoms by issuing car control and distribution directives. While these are based upon information which may be neither adequate nor timely, they can and are terminated when their need is no longer necessary. However, the "Code of Car Service Rules," proposed by Mr. Charles C. Robinson in his Verified Statement of June 17, in this proceeding, would remain in continuous effect regardless of need. Under these rules, both shippers and railroads would then be forced to operate in a highly restricted manner. The flexibilities now available through the car pool concept would be gone. The new rigidities instead of relieving present car supply problems, would, I believe, make them worse. I arrive at this conclusion as a result of a study run at my instigation and under my direction, to determine in specific terms what changes in our operations and car service re-

quirements would occur if witness Robinson's proposed car service rules were now in effect.

Basic Characteristics of Steel Mill Production and General Effects of Proposed "Code of Car Service Rules"

[4] Most steel mill operations are unique in a number of important respects, as follows:

1. While enormous masses of raw materials are consumed, finished steel items are tailor-made to order. For all practical purposes there are no "Shelf" items produced and stored awaiting arrival of customer orders.

2. Production processes frequently spread over a 4-week period, starting with the molten steel-making process and terminating a dozen or more operations later, on an inspection bed.

3. As is typical of many steel companies, our rolling mills were designed with limited storage capacities at their shipping ends. Their design assumes that a rapid flow of finished product would be loaded without delay on railroad cars or trucks. In most periods, this is possible. In great part this has been possible because of the national car pool concept. Except during national emergency periods, we have been able to use most cars at hand without regard to their ownership. Delays in finishing items for one shipment do not affect use of the car which would have been used had the delay not occurred. Other shipments are placed in the cars.

4. Rolling mills invariably contain integral finishing and shipping facilities. Each mill consists of a massive, complicated, very expensive, non-moveable complex of [5] buildings and machinery. After initial construction, expansion of any one facility is almost impossible. This inability to change or expand certainly applies to storage areas in shipping departments.

5. Inherent in the multi-operation, multi-departmental processes are many possibilities for rejection and delay in finishing. Prediction of shipping dates is difficult, even with computerized process controls. If cars had to be ordered for each shipment, therefore, this could not be accomplished in advance with accuracy.

DESCRIPTION OF INLAND'S STUDY AND FINDINGS

To obtain some measure of the change we would experience were Robinson's car rule proposals to be placed in effect, we made a random selection of a 2½-day period of shipping activity for study. In the study we simulated the actual procedures used to provide a car for an out-bound load except that we imposed upon these procedures the restrictions proposed in Robinson's rules. The cars that were studied consisted of all the types useable for steel item shipments that were released from the mill during the period beginning at 12:01 A.M., September 15, 1966, and ending 6:59 A.M., September 17. Essential details are as follows:

HOW CARS ACTUALLY WERE USED

Cars Used in Study	
Cars Outbound with Loads	368
Cars Outbound Empty	140
TOTAL:	508
Source of Cars	
Cars Inbound Loaded	206
Cars Inbound Empty	302
TOTAL:	508
Use of Cars	
Cars Inbound Loaded, Outbound Loaded	123
Cars Inbound Empty, Outbound Loaded	245
TOTAL OUTBOUND LOADED:	368
Cars Inbound Loaded, Outbound Empty	83
Cars Inbound Empty, Outbound Empty	57
TOTAL OUTBOUND EMPTY: *	140

* Due to being bad order, dirty, or in excess of need.

[6] Following compilation of the foregoing data we next recast our plan of operations to conform to the proposed Code of Car Service Rules. The following data summarize the condition.

[7]

APPLICATION OF PROPOSED CAR SERVICE RULES TO LOADS ACTUALLY SHIPPED

	No. of Loads	% of Total
Loads shipped in compliance with rules:	120	33%
Loads which could have been placed in available cars and routed according to rules:	133	36%
Loads which could not have been shipped in available cars, according to rules:	115	31%
Total Loads in Study Period	368	100%

Effect of Rules on Customer Routings

	No. of Orders	% of Total
Customer routings which could have been followed:	52	37%
Customer routings which could not have been followed:	89	63%
Total Number of Loads with Customer Routing	141	100%

Cars Released Empty from Mill	
Under actual operating conditions	140
Under proposed rules	255
Extra Cars Which Would Have Been Needed Under Proposed Rules	115

CONCLUSIONS BASED ON OUR STUDY

The Inland study leads to the conclusion that if adopted, the proposed rules will place a severe additional burden on Inland Steel Company and the railroads:

1. Cars released empty for lack of suitable use would have been 82% greater. (Our Transportation Department estimates that if this level were to prevail throughout the [8] year we would experience an additional direct operating cost of $408,000.00.)

2. We would not have had suitable equipment for 31% of

the loads; therefore, additional cars would have had to be requisitioned.

3. Our inability to ship 31% of the loads in available equipment represents the need to order cars, empty, for outbound loading, according to ownership as well as type. This also represents delay of shipments and a need for additional storage capacities. However, we previously described that such enlargements are not physically possible. Consequently, imposition of these rules could, in effect, reduce the shipping and productive capacity of Inland Steel Company as well as much of the steel industry of the nation. The only alternative would be to keep a supply of cars of all ownerships on hand with the result of increased demurrage charges and reduced car utility.

4. Customer routing requests could have been followed only 37% of the time.

5. The total number of cars we would have had to handle would have increased 23%.

6. An analysis of car ownership of equipment which would have been surplus empties under the proposed rules, showed that 66% of it was of eastern ownership. This is the typical condition of long standing. Unfortunately, approximately the same portion of our loads are destined [9] to areas not served by eastern railroads. Under present rules, this condition does not pose a problem.

In summary, the proposed rules would:

1. Require handling more cars.
2. Require an enlarged inventory of cars in our works.
3. Increase internal congestion, increase internal costs, increase demurrage, reduce shipping and productive capacity.
4. Decrease car utilization and, therefore, the effective capacity of the national car fleet.
5. These points, in grand summary, indicate that while the proposed rules may result in cars going back to the lines of their owners, this will be at the expense of overall car supply, for an average car utilization will decline, possibly precipitously.

It is Inland's recommendation that:

1. The proposed Code of Car Service Rules submitted by Witness Robinson not be adopted.
2. That further specific studies be made of ways and

means for encouraging ownership of cars through means which provide incentives rather than penalties for car ownership.

(Jones & Laughlin Steel Corporation)

[2] Jones & Laughlin Steel Corporation is a major user of rail transportation, and the efficient and effective operation of our numerous producing plants is entirely dependent upon this method of transportation. Practically all of the raw materials are transported via rail, as well as the preponderance of our finished products. The most efficient utilization of rail equipment is a vital concern to our Corporation, and we would certainly welcome any effective regulation which would bring about a more effective use of rail equipment. We have experienced numerous occasions, when, because of car shortages, we have been unable to load and ship our products as they become ready for shipment; and we have endeavored to overcome these deficiencies by constant vigilence in ordering and releasing equipment and anticipating our requirements sufficiently in advance to avoid all unnecessary delays.

It has always been our desire and practice to adhere to the car service rules to the fullest extent practicable. Our instructions to our mills are to furnish each line furnishing empty equipment, as nearly as possible, with the same number of loads in order to compensate them for their service. Likewise, we instruct our shippers to endeavor to the fullest possible extent to direct cars to the owning line or in the direction of the owning line in order to insure proper utilization of equipment. We have followed these practices throughout the years and feel reasonably sure that the carriers, as well as ourselves, have benefited materially from such practices.

* * * * *

[4] We frequently discuss our shipping problems with the carriers and seek their counsel in an effort to accomplish the best possible utilization of equipment. We feel confident in stating that these consultations have been very fruitful in bringing about the best possible results in car utilization between the carriers and ourselves and see no benefits to be derived from the recommendations of the Commission's staff.

Rule 3 suggested by Mr. Robinson is impractical and would bring about an undue hardship on our mills and result

not only in unnecessary expense to our mills but would cause a severe loss of car usage to the detriment of the carriers and in direct contravention to the very results which the Commission is trying to correct.

In most instances our mills have a scheduled plan of shipment for each day, and every possible effort is made to follow that schedule. If everything occurs according to shipping schedule, we would not encounter any difficulty and the loadings could very readily be made and cars directed to the home road without many problems. However, when material is scheduled for shipment, it must be assumed that the planned program will go off without change; otherwise, other material will have to be loaded and it becomes impossible to comply with Rule 3. In the operation of any mill it is generally the custom to plan shipments as far in advance as possible, and usually the materials shipped from a particular area require certain types of cars. It is no problem for the mill to order its cars as to type, but to be compelled to order them according to routing would pose a problem far beyond the comprehension [5] of the average mill shipper.

Many problems arise in a steel mill which prevent scheduling according to rail routes, such as metallurgical inspection, customer releases and changes, production breakdowns, and any number of unforeseen developments preventing loading as originally planned. When such interferences occur, other material is loaded and shipped in order to keep the production lines moving. If the shipper were required to confine his loadings so as to direct equipment to the home road, he would be confronted with a serious problem every time a delay or change was made in his loading schedule, which occurs not only daily but in many instances hourly.

As a very specific case, may we cite the operation of a normal pipe mill, which incidentally uses gondola cars exclusively. Pipe is produced in rolling cycles. Let us assume the mill is rolling $6\frac{5}{8}$" pipe. They may produce this size for a period of several days, and all of the orders from several customers requiring this size and metallurgical analysis will be produced on this rolling cycle. The pipe must be inspected, tested, and released for shipment before it can be loaded. Customers must authorize shipment, and to the extent possible the material is loaded and shipped. This material is shipped to destinations throughout the United

States via all routes. It is, as previously stated, loaded in open top equipment; consequently, we can inform the carriers how many gondolas we will require, but we certainly cannot inform them in advance how many of each participating carrier's cars are necessary and exactly how many will be loaded on a certain day. Because of necessity we try to load the maximum number of cars possible [6] daily. If we are required to plan an exact number to load each day, it would result in unnecessary operating expense to our company, serious loss of revenue to the rail carriers, and cause a loss of car utilization on days when interruption occurred in the production, inspection, or releasing of material. The restrictions suggested by Rule 3 would be prohibitive under these conditions and would cause an unreasonable and unwarranted expense to producers of these products.

These same situations would prevail at practically all of our mills, and the ultimate result would be to frustrate total steel production and cause an unfair and unreasonable expense in the operation of our mills. The loss of steel production would be contrary to the best interests of national defense.

In addition to the impracticability of mill loading, many cars have been designed specifically for steel loading. Covered coil cars were developed to return to the rail carriers coiled steel lost to other forms of transportation. Prior to the development of this type of car the rail carriers were encountering numerous claims for damages, and customers were required to pay additional costs for wrapping and shrouding these loads. As a result of many conferences between shippers, receivers, car builders and the railroads, a car was developed to overcome the rail carriers' deficiencies and a very substantial portion of these shipments were returned. To place this type of equipment under the proposed Rule 3 would undo years of hard work and ingenuity and most likely drive a large portion of this tonnage back to the trucks. The same situation would prevail in the use of covered cars and "Damage Free" cars.

[7] Thousands of gondola and hopper cars are used in the movement of coal and ore from the mines to the mills. These cars are used exclusively in this trade and are not suitable for other purposes. In most instances, this type of car remains on the owners' rails, but to place the proposed

restrictions against them would cause chaos in the production of our basic metals and result in severe loss of revenues to the rail carriers. These products move in trainload quantities daily, and any interruption in the service would result in serious damage to the national defense. By the same token, the carriers have designed special 100-ton hopper cars for the movement of lime from the quarries to the mills. Again, these cars for the most part do not leave the home line, but they should be permitted to move freely as they do now without stringent tariff regulations, which could only result in hampering the free movement of this vital material in the operation of Basic Oxygen and Open Hearth Furnaces.

We have cited only a few of the situations which would be caused by the proposed Rule 3 suggested by Mr. Robinson to our own mills, and multiplied by the hundreds of steel producers and fabricators we feel certain the adoption of such a rule would be prohibitive to the commerce of the country.

* * * * *

R.V.S. No. 72—Harvey F. Nearing

(Manufacturing Chemists' Assoc., Inc.)

[1] The chemical industry, as represented by members of the Manufacturing Chemists' Association, is a major user of rail transportation. In addition to the large number of private railroad cars used by its members, as an industry, it is a large user of all types of rail transportation in the country. Efficient and adequate rail service is essential in the conduct of the chemical industry business. We welcome the Commission's interest in trying to improve railroad transportation by its investigation of the adequacy of railroad freight car ownership, car utilization, distribution, and applicable rules and practices. The chemical industry, in addition to its large use of tank cars, also uses boxcars, covered hopper cars, etc., and has shared in the national boxcar shortage.

[2] It must be recognized that: First, the utilization and transit time of cars now in service needs to be improved, and Second, the national car fleet needs to be increased in size with the addition of the right kind and right mixture of proper cars to fill the gaps that such a utilization program indicates. The chemical industry is hopeful that this proceeding may be beneficial in both ways.

The proposals and proposed Car Service Rules submitted by Witness Robinson suggest changes in present car distribution practices which are designed to provide for an effective solution to the existing problems of car shortages. The chemical industry believes that Mr. Robinson's suggestion relating to the Car Service Rules will create the opposite effect from that intended. The emphasis in the suggestions proposed by Mr. Robinson's Car Service Rules is slanted to the return of cars to their owners via the specified routing required. This emphasis is to define cars on an individual ownership basis rather than on a national pool basis, which has been traditional. [3] It is obvious that placing primary emphasis on the return of empty cars to owner's rails rather than to the points of need will increase the volume of empty car movements resulting in fewer loads being moved and added loss of efficiency; hence, it is our belief that more effective utilization will result if the car supply is treated as a national pool and less emphasis is placed on increasing the return of cars to owner's rails.

Sufficient added incentives should be provided to induce the railroads to own more cars, thus increasing the national car pool.

Proposed Car Service Rules 1 through 4 and the discussion in Mr. Robinson's statement concerning these proposed rules set the tenor in creating a situation that makes the application of the total proposal as being impractical. . . . Proposed Rule 4 would require publication of all of the proposed rules in tariff form. This would make the shipping public liable to all of the penalties of the Transportation Act and related statutes for failure to conform to the proposed rules. We believe that the proposed rules as a tariff requirement are not workable nor will they be realistic if put to actual practice.

[6] It is our position that in many situations carriers and shippers at regional and local levels are better equipped and can more effectively cope with the multitudinous problems created by car shortages than a federal agency removed from the scene.

This gets us to a consideration of the proposed rules. Rules 2 and 3 do not in themselves appear to be a great departure from present practices. However, when coupled with proposed Rule 4 which prohibits acceptance from shippers of cars loaded in violation of rules two and three, they place a further burden upon the shipping public which is already suffering from shortages of rail equipment. Additionally burdensome could be Rule 12 which requires that orders for cars be placed with originating carriers.

The Interstate Commerce Act requires rail carriers to funish sate and adequate car service and accords to the shipper the right to route his own freight. By prohibiting carriers from accepting from shippers cars not loaded in compliance with proposed rules 2 and 3, proposed rule 4 would in some situations deny to the shipper the right to route his own freight.

Certainly a selling shipper, more than anyone else, is interested in getting his goods to his customer as quickly as possible. For this reason he is well acquainted with the route which will provide that customer the most efficient service and at the same time save car-days. Such a route is not necessarily over the line of the car owning railroad even though such a route is available.

Furthermore, the mandatory application of proposed rules 2 and 3 would work extreme hardships in certain industries by upsetting long established business practices built upon selling their products [7] while in transit. Similarly such a rule would unduly penalize a shipper who in good faith loaded a car in compliance with rules 2 and 3, only to later learn that changed situations beyond his control require shipment to another part of the country. Here compliance with rule 4 would result in double car handling and help none.

Many rail shippers have indicated that if unable to load a

car that is on hand and ready for loading because such action would violate rules 2, 3 and 4, they would arrange to ship by a competing mode of transportation. Though this could result in a higher rate it could also result in lowered overall costs on account of the delay incident to compliance with the proposed rule.

Additionally the proposed rules could work considerable hardship on continuous process and fabricating industries in situations where inbound and outbound cars move in the same general direction. Under the rules, inbound cars owned by the originating line would have to be returned in the direction of that line and would not be available for reloading to the ultimate destination.

Certainly a rigid application of the rules could necessitate increased switching on the part of the carrier or shipper, whichever performs that function. Some of our members anticipate a doubling of car handling in and out of their plants with increases in administration as well as switching costs.

In addition to the specific rules that he proposes, Mr. Robinson suggests that the carriers might file other rules as part of the tariff, at their option. Perhaps Mr. Robinson felt that additional rules could be used to clarify and refine the mandatory rules he proposed. Nevertheless, it is our opinion that this would only compound the confusion which would be created by adoption of Proposal 2 as presently worded.

[9] * * * * *

Conclusion

In summary it is the position of the regional shippers advisory boards that:

A. Car service rules proposed by C. C. Robinson (Rules 2, 3, 4 and 12) would work unnecessary hardships on shippers, limit routing and actually delay shipment. They would create red tape but not improve utilization.

B. The publication of car service rules in tariff form would further add to the red tape and create an unnecessary rigidity that could discourage maximum efficiency in car utilization.

C. Demurrage rules proposed by C. C. Robinson should not completely disregard wide variances in circumstances and conditions at ports or terminals when generally recognized to exist.

D. The arbitrary imposition of an embargo at all points where carriers have more than a 2-day backlog of cars to unload could work an unnecessary hardship on those handling seasonal movements such as ore, grain and coal.

E. Development of a car ownership formula is essentially a function of the railroad industry. It should be used by industry as a guide for determining its requirements, individually or collectively and should not be used in any proceeding for determining ownership requirements of particular kinds or sizes of equipment.

[2] Broadly, Mr. Robinson's proposed Rules will place an unconscionable burden upon the shippers throughout the country. He proposes taking, for the most part, present Car Service Rules unilaterally developed by the Association of American Railroads over the years for the purpose of managing the nation's car fleet and having them published in tariff form and filed with the Commission (Pg. 127). Thus, the proposed rules would become the law of the land leaving with the shippers a Code of Rules which not even the railroads have been able to successfully live with. This is especially the case in recent years as the national car fleet diminished in numbers.

As I stated on page 6 of my verified statement, steps taken by the carriers to minimize the effects of the current car shortage have placed penalties on the shippers. Now Mr. Robinson is proposing a Code of Rules which compounds this situation.

The League strongly opposes a Commission finding supporting Mr. Robinson's proposal of a Code of Car Service Rules being published in tariff form because in doing so, what are now voluntary rules for the guidance of railroad management, become in effect statutes with which the shipper is encumbered. The League would much prefer that the Code of Car Service Rules [3] be voluntary in nature and that the Commission continue to exercise its authority in emergency circumstances whereby temporary orders would be issued distributing cars of *any* ownership to those areas experiencing severe car shortages due to the inability of the loading carriers to furnish the necessary equipment.

Certainly the Commission would not adopt Car Service Rules so rigid as to prevent the free flow of commerce by railroad. At the local level the carrier and shipper are in the best position to adapt themselves to car shortage conditions. Extreme differences may apply among the thousands of shipping points throughout the nation. No single rule or rules can be expected to meet the conditions unique to the various shipping origins and destinations.

Whether a shipper is small and represented by a single

plant, or larger, maintaining a multi-plant production scattered throughout the United States, it is almost impossible to carry on an efficient shipping program if the shipper is prohibited (Rule 4) from loading cars contrary to Rules 2 and 3. As examples:

(a) When a car is made empty at a receiving point and is suitable for reloading in the same plant, the efficient utilization of railroad car equipment dictates that the shipper reload the equipment immediately regardless of whether or not the owner of the car receives a portion of the outbound haul. It is clear that if in order to comply with [4] Rules 2 and 3 the shipper may not use the car made empty at his plant, the car must be switched from the plant and another car switched into the plant. Double handling of equipment and increased empty car days will result. I do not think it is arguable that in this example freight car utilization is impaired.

(b) The location of a shipper's plant and the direction of movement from that plant to his markets may be such that strict adherence to Rules 2 and 3 becomes impossible. Assume a plant in Nebraska receives its raw materials in boxcars of eastern ownership. After processing, boxcars are required to ship the finished product to the west coast. If western cars are not available, the shipper cannot use the eastern cars.

The total transportation is from the east to the west, with a suspension of transportation in Nebraska. The Nebraska shipper may compete with a producer of the same product in the east. The eastern producer has the car available for use across the country. This is denied the producer in Nebraska, under Mr. Robinson's proposed Rule 4.

The paradox would be that a readily available supply of eastern cars exists, but the outbound movement is frustrated in the absence of western cars. Persons on the periphery of the transportation function, including industrial management, would be hard put to understand the rationale of rules that create this situation.

[5] (c) Most shippers are aware of rail transit times from their plants to their markets. Indeed, the present chronic car shortages and consumer demand dictate a keen awareness of this situation. In many instances to obtain the fastest time between plant and market means routing a car

over a route other than the railroad car owner even though he may have a route available. If cars, under Mr. Robinson's suggested Rules 2 and 3, must move via the owning line between origin and destination and time in transit is the sacrifice to comply with the Rules, car utilization is jeopardized.

Let me illustrate. A car of Burlington ownership loaded on the Santa Fe Railroad at Albuquerque, New Mexico, destined to Boston, Massachusetts, can achieve best transit time by moving on the Santa Fe to Chicago for interchange with the eastern carrier. Under proposed Rules 3 and 4 the shipment should move over the Burlington, someplace between the origin and Chicago. This must increase the transit time, which in turn increases car shortages.

I fail to see how the car supply is improved by moving a car over the owner's line when the owner is a bridge carrier or otherwise.

Further, if the shipper complies with Mr. Robinson's proposed Rules 3 and 4, and the Burlington is not a party to the lowest rate applicable to the shipment, the shipper sustains damages to the extent that the Burlington rate exceeds the rate applicable via the Santa Fe.

[6] (d) Where shippers switch their own plants, Rules 2, 3 and 4 would sharply increase the plant transportation department's operation costs. Using the example shown in (a) above, the shipper must double his switching operation when he is unable to reload empties because of the requirements of Rules 2, 3 and 4.

(e) Assume a plant having three loading tracks ships three loaded cars per day from each track to destinations in the West, the South and the East. After the car order is given to the local carrier, the carrier must preselect the empties if available to be shoved into the three tracks within the plant. Should an error be made, under Mr. Robinson's proposed Rules 2, 3 and 4 the cars must be pulled from the plant and reset correctly. This operation compares with the present practice of the railroad simply pushing on to each of the three tracks three cars regardless of ownership. Adherence to the proposed Rules would seriously delay the delivery of empties to the loading tracks in the plant.

(f) At the present high level of business activity in the country, last minute changes are frequently required in

shipping cars after being loaded. A shipper, wishing to comply with the Rules, has loaded a Southern Railway boxcar for forwarding from his plant in Nebraska to Atlanta. After completion of loading, the plant receives instructions to service instead a customer in the Pacific Northwest. Under Rules 2, 3 and 4 as proposed, the shipper would be unable to service his customer in the Northwest until the Southern car was [7] pulled from his plant and an empty put in its place having ownership of either the originating line, the bridge carrier or the destination carrier in the Pacific Northwest. In the event the shipper's output equals one carload per day, it would be necessary to unload the Southern car and reload the material into another car which would comply with the proposed Rules. In this example, the proposed Rules take away from the shipper his ability to most efficiently serve his customers. Time is of the essence in car utilization. *So, also is time of the essence in distributing an industry's production.*

(g) For a number of reasons a shipper may not wish to move a car over the owning line's route between origin and destination. Rules 2, 3 and 4 in tariff form take away from the shipper his right to route which has historically been guaranteed by the Act.

(h) Proposed Rules 2, 3 and 4 will reduce the railroads' revenues. If a rail car, complying with Mr. Robinson's proposed Rules 2, 3 and 4 is not available to the shipper, his only recourse is to use a different mode of transportation. Indeed, the additional administrative detail required to police car requirements under the proposed rules suggests to management that such details are unnecessary when using trucks, barges or private carriage to move the traffic.

In the last analysis, and here I agree with earlier Commission findings (323 I.C.C. at page 50), the nation's [8] railroads *must* immediately develop a long range plan to double the nation's car supply. The best way to end car shortages is to have enough cars to move the industrial output of a booming economy. If this is done, a minimum of regulations necessary to supervise the distribution of cars is all that is needed. This is far better than rigidly by law endeavoring to manipulate an inadequate car fleet which does not meet the needs of the country's commerce or national defense.

To summarize,

(a) Mr. Robinson's proposed Rule 4 would place on the shippers throughout the country an intolerable burden, which might very well cause severe handicaps to the orderly distribution of the country's commerce. Financial losses may well result.

(b) Rules 2, 3 and 4, proposed by Mr. Robinson, present to shippers situations over which they have no control. The League has urged that the Commission adopt rules providing maximum utilization of the present car fleet during the current emergency. I believe there are other ways to accomplish this than the adoption of a carrier initiated Code of Rules that is not responsive to the problem. Centralized responsibility to assure an adequate car supply should come long before rules which take away from the shipper the right to load an empty car within his plant because the route of movement may be in the direction opposite to the ownership of the car. Proposed Rules 2, 3 [9] and 4 do not solve the problem of a thousand cars awaiting loads in Massachusetts while at the same time one thousand loads are awaiting cars in Colorado.

(c) There is a correlation between the Gross National Product and the requirement of cars for the distribution of that product. Plant expansion geared to increased customer needs must be carried out by the railroads as well as and together with industry. The Commission should adopt rules which require the carriers to meet their projected obligations.

(d) Adopting Mr. Robinson's proposed Rules 2, 3 and 4 in tariff form would place a substantial legal burden, to no purpose, on the nation's shippers, some of whom, as a practical matter, especially in the case of smaller shippers, may well not even be aware of such legal obligation. The League urges that any practicable and easily applied rules should be voluntary thereby permitting sufficient managerial discretion to be used to best serve the nation's interest. The development of systems which quickly analyze statistics and alert the Commission and the carriers to pending shortages will go much further toward relieving the situation than rigid rules that may perpetuate and/or aggravate the lack of an adequate car supply.

Supplementing the position of the League I have set forth at pages 2-3, et seq. above, the League also urges that the Commission not adopt Mr. Robinson's proposed Rules 2, 3 and 4 as set forth in his Verified Statement.

[3] It would appear that the problem of rail car shortage is most acute during periods of grain harvest when the demands for ordinary or regular box cars to handle the grain are at their peak. Further the greatest demand for this equipment is in the Central, Midwest and Western states, the so-called grain belt. This is evidenced by some of the more recent Service Orders issued by the Interstate Commerce Commission applying against box cars, SO 953, 976, 977 and others. Since steelmaking plants predominently use open equipment, it is respectfully suggested that open equipment be eliminated from the requirements of the proposed Car Service rules.

A further refinement of the proposed rules may be in order when considering special type equipment such as covered gondolas, Damage Free box cars, and cushioned underframe box cars designed specifically for the handling of the heavy loads of the steel industry such as hot and cold rolled sheets in coils or cut lengths, galvanized or coated sheets and tin plate in coils or cut lengths. This type of equipment does not lend itself to grain loading.

We have always endeavored to abide by the spirit of proposed Rule 1 for our own best interests and that is to try to load home equipment to destinations on the home road or in the same territory as served by the home road. However, at our Weirton Steel Division plant served exclusively by the Pennsylvania Railroad Company and at our Midwest Steel Division plant served exclusively by the New York Central Railroad Company, we do not get sufficient home roads cars to enable us to serve our customers in the territory and the home roads must therefore furnish us with some foreign equipment. Additionally, at these two plants, we load large quantities of tin plate to customers throughout the country. Foreign carriers send in a large number of special equipment cars, (heavy duty box cars, "DF" cars and covered gondolas) generally made empty in the area or cars [4] that would normally be returned to the owning road empty but are sent into these plants to get loads for the return movement. If the local railroads had sufficient equipment of these types for our

needs and we had to depend only on these local railroads for furnishing us with their own equipment, we would have to load such cars to these distant points and thereby contribute to the shortage of such equipment and to our own detriment.

Most of our inbound materials are handled in open top equipment and some of such equipment is used for outbound loading. Under Rule 2 and 3 such equipment must be loaded to or via the home road or turned over to them empty at the nearest junction. This would increase the empty movement of such equipment and cause considerable more switching for our plant power and the carriers serving our plants.

Compliance with the provisions of Rule 12, would impose on us a most impracticable and almost impossible requirement. With the practice of inventory control by all of our customers and the manner in which steel is produced, we do not know 24 hours in advance what material will actually be ready for shipment and to what destination or customer it may be shipped except in a general way. We practically tailor each heat to a customers specifications; for example, there are hundreds of different specifications for tin plate and other products to a lesser degree. Thus we could not order specifically in writing cars needed for loading on the following day.

* * * * *

[5] I do not believe that these rules, as they may be amended and issued for observance by carrier and industry, should be put in tariff form as suggested. It would seem inappropriate that operating rules for the carriers operation under prescribed circumstances or for industry use of equipment be promulgated in tariff form for filing with the Interstate Commerce Commission, except as at present covered by National Car Demurrage Rules and Charges contained in Agent H. R. Hinche's tariff 4G ICC H-67 on file with your Commission. I see no objections to such rules being included in this publication for information only as is at present done with effective Service Orders.

At present our outbound products from our mills are handled:

	Rail	Truck
Great Lakes Steel Division	55%	45%
Weirton Steel Division	41%	59%

Midwest Steel Division	40%	60%
Hanna Furnace Division	85%	15%

The imposition of the drastic car service rules as proposed without some alteration as suggested would only force us to seek other means of transportation to satisfy the needs of our customers. As evidenced by past experience, traffic lost by the rail carriers because of such incidents seldom returns to the rails. This may be observed in our outbound business as tabulated above.

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R. V. S. No. 80—James E. Singleton and Donald A. Haakenson

(for Public Utility Commissioner of Oregon)

[3] In order that the Commission may move promptly but with long term certainty we urge that the Commission find that the public interest requires:

1. Adoption of the Proposed Code of Car Service Rules as contained in Appendix A to the verified statement of Charles C. Robinson.
2. Adoption of all Proposals numbered I through X in said statement, except that rules affecting demurrage rates and free time provided in Proposal VI therein shall not be applicable to export traffic presently before the Commission in I & S 8230.
3. Implementation of said rules and proposals for a minimum interim period of 12 consecutive calendar months to provide an appropriate experience base thereunder.
4. Reopening of the proceeding upon expiration of the interim period to allow review of the effects of such rules and proposals.

We believe the above course of action will allow the Commission to move promptly and yet provide a satisfactory experience history upon which to assess effects which the proposals supported herein may have on freight car utilization and shortages, and upon the various parties concerned with this proceeding. Thus aided, the Commission will then have a more complete record upon which to predicate a sound and equitable final disposition of this matter.

R. V. S. No. 81—Edward F. Heitz

(U. S. Department of Agriculture)

* * * * *

[7] Mr. Robinson, in his statement for the Commission, made a number of proposals with respect to car utilization. We have no position with respect to the Proposed Car Service Rules 8, 11, 12, and 13, suggested by the Bureau of Railroad Safety and Service (pages 104-5 of Mr. Robinson's statement) because they would not, in our opinion, have any material affect on the overall problem of improving car utilization of general service equipment. We support Mr. Robinson's [8] suggestion that the present voluntary Car Service Rules 1, 2, 3, and 4, of the American Association of Railroads be made mandatory, because this "will enable all carriers to more intelligently evaluate their ownership needs." We suggest, however, that such rules be mandatory only on an interim basis, until a more adequate system of developing data for defining surpluses and deficits on a continued basis is developed. However, it should be clear that we do not accept the premise, that the mandatory aspect of Rules 1, 2, 3, and 4, will necessarily result in improved utility of equipment on a regional or national basis, or that absolute enforcement of these rules could possibly result in the optimum utilization of equipment. Our support is based on the fact that the mandatory requirement and observance of these rules is better than nothing until a more efficient method of defining and improving car utility is developed. We believe that a nationwide data processing system is an essential tool in analyzing and solving the problems which could lead to greater car utilization.

* * * * *

[5] Steelmaking is properly considered a mass production industry. However, it is also an industry in which most customers' orders are custom made. Steel sheets, for example, are ordered in literally thousands of different specifications, differing both by size and chemical composition of the steel. A user of steel sheets, for example, will order many different sizes and grades for different applications. The same is true of other steel products.

Many plate and structural items are specially rolled and producers are required to meet very close tolerances and specifications. All of this means that most orders cannot be filled out of stock or inventories but must be specially produced to meet a specific order.

After an order for steel is received the customer is advised of the contemplated delivery date in the light of availability of production facilities, processing time required and prior commitments made. Ordinarily, such delivery times specify the week when the order will be shipped or available for shipping rather than a specific day. Since the steel is made to order and since there are numerous steps in the manufacturing process beginning with the smelting of the ore in the blast furnace, it is necessary at every step to make sure that all quality requirements have [6] been met. This has necessitated the establishment of extensive and detailed scheduling practices and control. Each of the numerous steps in the manufacturing process involves variables which may affect or change the original schedule.

The first step in steelmaking is the smelting of the ore in a blast furnace; this produces molten iron. The iron from the blast furnace is then placed in an open hearth or other type furnace where alloying elements are added to produce steel. The molten steel is poured into molds. After the steel has cooled sufficiently to permit the stripping away of the mold, it is called an ingot. When the ingot has been brought to a temperature suitable for rolling in a furnace called a soaking pit, it is rolled into a primary shape such as a slab, billet or bloom. It is now ready for rolling into a commercial form such as sheet, plate, structurals or pipe.

[7] However uncomplicated the fundamentals are, the many details of steel production and the necessity of careful checking to assure compliance with specifications create many variables. Moreover, many customers order a variety of items and the entire order must be shipped at the same time. Consequently, it is constantly necessary to make adjustments in production schedules in order that all of the items may be ready for shipment at the same time. These variables make the forecast of just when any particular order will be shipped extremely difficult.

* * * * *

[13] The final step in the manufacturing of steel is the shipping or the actual loading of cars and the issuance of related papers. Similar to packaging, shipping schedules are established on the basis of promised shipment dates, customer delivery requests, availability of finished material in shipping quantities. One coil missing out of an ordered quantity may hold up an entire shipment. Similarly, the lack of final metallurgical approval will delay planned loadings. Availability of crane and manpower normally limit the number of cars which are loaded in any one day and if they are required elsewhere, planned loadings will be delayed.

In addition to the foregoing, which are inherent to the steelmaking process, there are any number of external factors which cause delays in the originally planned shipments. A customer who has ordered a particular size, grade or quantity of a product may, while the material is being processed and prepared for his order, change one or more of these features of his order so that the steel allocated to him is no longer acceptable and the planned shipment cannot be met. Similarly, a customer who has been previously promised a shipment may require an earlier date or may ask that it be shipped later than originally planned or, indeed, that it be held by us for some specified period of time.

* * * * *

[16] Where the material requires so much final processing after the rolling stage, certainly there is room for developments which may affect the date of shipment. It is of paramount competitive importance that we ship just as soon as possible after the material is ready.

[17] One of the products manufactured by United States Steel Corporation which achieves a high degree of accuracy in meeting rolling schedules and a product, the major portion of which is loaded to cars directly from the mill, is pipe. At our National Works at McKeesport, Pennsylvania, we manufacture seamless, electric weld and submerged arc weld pipe for use in Oil Country Goods and Trunk Line Piping. From the foregoing, we might assume that highly accurate forecasts of individual car requirements could be made. However, in this product too, there are forces which prevent us from doing so. Chief among these is that we do not get shipping instructions from our customers until we are actually rolling or until after the material has been loaded. Much of the material produced at McKeesport and other pipe plants is shipped to customer job sites or customer multiple location warehouses.

Pipe customers as a part of their inventory management, wait until the last possible moment to decide where they want a particular carload sent. While all orders rolled and loaded do not lack shipping instructions, the incidence is high enough to prevent us from specifying beforehand exact car requirements.

[19] As we have no way of knowing exactly how much cut back will occur, we cannot predict exact car requirements. We must, of course, have cars available which can take the resulting product whether it be long pipe or short pipe. If only a small amount of long pipe must be cut back, and we are unable to adjust the schedule of long pipe rolling, accordingly, we must increase the planned rolling of short pipe. We, therefore, cannot forecast in advance the destination of the carloads which will be shipped on a given day.

Finally, the Commission must consider our present warehousing capabilities when determining the feasibility of Mr. Robinson's proposals. Our plants were built with the expectation that very little finished product would be stored at the plant. Of course, a certain amount of material must be stored for various reasons, and this amount has increased in recent years. Our facilities for warehousing are already very greatly overburdened.

[20] Consequently, if Mr. Robinson's proposals were to become effective and we continue to use rail transportation to the extent which we presently do, it would only mean that a greater percentage of our shipments would have to be

stored for some period of time awaiting our receipt of the proper cars. We do not presently possess the facilities for such storage. Most of our plants are already crowded, and it is doubtful whether additional storage space could be found.

In order to insure an adequate supply of special railroad equipment, each Thursday each of our plants gives to our Traffic Department a forecast by destination of the number and type car required for the following week. This is based upon an examination of the orders scheduled for completion the following week. We recently made a study of loading compared to the forecast of special equipment at our Gary mill for four weeks in August, 1966. Exhibit I, attached hereto, incorporates the results of that study. It should be noted from the exhibit that while total cars used compared to those forecasted for use per week ranged from 87% to 104% of the forecast, the totals by type of car show a wider [21] variation: e.g. coil cars ranged from 89% to 134%, covered gondolas from 87% to 140%. The even wider variation on boxcars, 55% to 124%, is due primarily to shipments of tin plate from stock, where it is virtually impossible to make an accurate forecast since we are subject to daily releases from our customers without prior information as to their shipping requirements. Still wider ranges of performance are evident on a railroad ownership basis as detailed in Exhibit I for covered gondolas and coil cars. Some of the variance experienced in these cars is due to flexability in routing whereby we can use cars of ownership other than those forecast when the forecast cars are not available and others are on hand. A sizeable portion of the undershipments are due to (a) customer changes to other modes of transportation, (b) customer holds or deferments, and (c) failure to have material ready to ship in the week promised. In those cases which show a higher number of cars shipped compared to cars forecast, the main contributing factors are (a) changes by customers from some other mode of transportation to rail, (b) release by customer of material which was previously ready but which had been suspended or held indefinitely, (c) shipment of material delinquent from previously promised weeks and, (d) shipment of material promised for the succeeding week which became available and was shipped in order to satisfy customer requests for shipment earlier than promised.

[22] Ordinarily at our various locations the beam and structural mills are able to adhere rather closely to their rolling schedules. Consequently, at our structural mills at Homestead Works in Munhall, Pennsylvania, beams and structurals which have been reported as being ready or close to being ready are planned for shipment by schedulers. Each day, by 3:00 p.m., the scheduler issues a loading schedule for each of the mill loading areas for each loading shift of the next day. The schedule shows the load number, customer order, items and tons to be loaded. In order to determine the accuracy of this forecast, which is made 9 to 33 hours in advance of a turn, we recorded the results of actual loadings versus scheduled loadings for the week beginning September 4, 1966. Results of the survey are incorporated in Exhibit II attached hereto. That exhibit shows that of 282 carloads scheduled, 129 or 45.7% were not loaded on the turn scheduled. Further, 124 of these cars or 44% were loaded on a calendar day later than that for which originally scheduled. The exhibit also details the reasons for not loading on the turn scheduled.

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EX PARTE 241
WITNESS: D. J. O'Leary, Jr.
EXHIBIT II
Page 1 of 2 Pages

HOMESTEAD WORKS
SUMMARY OF CARS NOT LOADED IN
ACCORDANCE WITH SCHEDULE / BEAMS AND STRUCTURALS
Week Beginning September 4, 1966

	No. Carloads	% Total Loads Scheduled
Loading Trucks		
Cars were not loaded because of heavy influx of trucks requiring loading in same area for which carloading had been scheduled.	26	9.2
Preferenced Loads		
Cars which were scheduled for loading were not loaded due to loading cars with material which became available and which was either (a) past due, (b) promised for earlier delivery than loads scheduled or (c) was under customer pressure for delivery.	22	7.8
Transferring Material		
Cars were not loaded as scheduled due to time spent by crews and cranes in transferring material from one processing area or one storage area to another.	20	7.1
Completing Previous Starts		
Cars were not loaded as scheduled because crew and crane time was spent on completing cars which had been started on previous turns but which had not been completed.	11	3.9

EX PARTE 241
WITNESS: D. J. O'Leary, Jr.
EXHIBIT 11
Page 2 of 2 Pages

	No. Carloads	% Total Loads Scheduled
Cars Not Available		
Material not loaded as scheduled due to special cars, such as high side gons or combination of cars (sets) for long material, not being placed in time for loading.	9	3.2
Combination Car Not Received		
Material not loaded as scheduled because car containing material loaded in some other plant or other mill area was not received in time for loading.	8	2.8
Material Not Available		
Material not loaded as scheduled because some portion or item of material, which was scheduled to be available in time for loading, was not available when required.	8	2.8
No Room on Track		
Material not loaded as scheduled because there was not sufficient room on loading track for placement of empty cars due to space occupied by cars of material being transferred, previous starts not completed or pulled, etc.	5	1.8
Miscellaneous and Not Explained	20	7.1
TOTAL	129	45.7

[2] United States Steel Corporation maintains major steel producing facilities at Pittsburgh, Pennsylvania; Cleveland, Ohio; Youngstown, Ohio; Birmingham, Alabama; Joliet and Waukegan, Illinois; the Chicago, Illinois, Gary, Indiana complex; Geneva, Utah; and Pittsburg, California; as well as other facilities located in many other areas. Each of the locations is served by rail as well as other modes of transportation. Consequently, as we indicated in our *Petition For Leave to Intervene,* our use of the railroads both for inbound raw materials, equipment and supplies and outbound finished and semi-finished steel product makes us one of the major users of railroads in this country and further explains our interest in the present proceeding.

Prior to July 1, 1966, the Bureau of Enforcement of the Interstate Commerce Commission introduced the Verified Statement of Charles C. Robinson which proposed several measures designed to achieve a more satisfactory railroad car supply. I do not believe that those proposals would achieve that expectation. Rather, I believe that if enforced they would impose undue hardships on both the rail carriers and the industries which use the service offered by those carriers for they attempt to apply one set of rules to the entire country. This approach fails to account for the widely [3] varying transportation and economic conditions which occur within the various locales and industries. The number of special situations which would require modification or exemption from the rules as proposed would be endless and any considerable number of exceptions granted would result in their rapidly becoming unworkable and hence a hinderance to effective transportation.

Mr. Robinson is undoubtedly correct in assuming that there are only two ways in which to improve railroad car supply; either the number of cars available for service must be increased or car utilization must be heightened. I do not believe that as a representative of a non-carrier, I am in a position to suggest to the Commission whether the railroads can or cannot acquire more equipment. I must, however, take issue with such a proposal if its practical

effect will be to diminish the service which the railroads can provide United States Steel Corporation because they cannot comply.

In a very real sense many of the proposals which Mr. Robinson offers directed towards car utilization would be unworkable. To the extent that they are to be applied to all type cars they presuppose that a national shortage exists in cars of all descriptions. This is not the case.

I.

Proposal II

Car Service Rules 1 to 4

[5] In order to conserve the Commission's time I shall not repeat here verbatim the car service rules referred to in this heading. Generally, they require that cars be loaded to, via, or in the direction of the owning railroad. Compliance is made mandatory and the carriers are prohibited from accepting any cars which might for one reason or another be loaded in violation. As is explained by Mr. O'Leary in his verified statement which is being filed simultaneously with mine, it is extremely difficult for a steel producer to accurately forecast prior to loading and shipment what customers' orders will be prepared on any particular day. Consequently, ordering empty cars of correct ownership so as to match them with properly routed loads would likewise be exceedingly difficult if not impossible. In order to comply with these proposed rules, it would be necessary for us at various locales to order cars substantially in advance of shipping in order to be assured of securing adequate cars. [6] Our plants in the Pittsburgh area, for example, are served by the Union Railroad, a switching line. It is necessary for us to order cars from the Union, which must then order them from the connecting trunk lines. With these rules in effect, the individual trunk line would first have to determine that the cars required were available in one of their several yards, classify the cars, and finally perform the movement to the Union Railroad interchange. The Union would then have to move these cars from the interchange via their yard, re-classify them and move them to the desired loading point. Based on previous experience with special equipment, we estimate that a minimum of 96 hours would be required to accomplish all of this. It

should be noted that the same type problem does not occur with truck movement. Trucks can be furnished on much shorter notice, and they may readily be utilized for loading at another facility if the load for which they have been ordered is not ready when they arrive.

In order to determine the effect which these four rules would have upon our present operations, we analyzed shipments originating at four of our major facilities for one or two five-day periods. These facilities were selected because they produce most of the major types of steel products which [7] are presently shipped by rail. In addition, they are located in the heart of the steel-producing areas where ordinarily there is a wide distribution of empty car ownerships in the railroad yards which serve them. The study compared loads actually shipped from the four locations to the empty cars available by ownership. Cars were considered available if they were within 24 hours of the plant on the day preceding the shipment. The cars actually available were reduced proportionately by ownership to a 24 hour car supply in order to reflect the mandate of proposed Rule 7(B). Where the shipping point selected for study was only a part of a complete plant, or was only one of a number of shipping locations drawing empties from a particular railroad yard, the empty cars available were allocated among them in the same proportion that the outbound loads from each facility bore to each other. Adjustments were also made for other sources of empties supplying other facilities as indicated on page two of Exhibit I. The results of our study appear in Exhibit I attached hereto. There you will see we discovered that our present available mixture of empty car ownerships and our present variety of destinations, we could achieve a theoretical maximum average weekly compliance of from 38% to 75%. The term "theoretical" is used inasmuch as these studies incorporate relatively ideal conditions which would seldom, if ever, exist in actual [8] practice. Yet, even if it were possible to achieve our theoretical percent of compliance, we would still fall short of being able to adhere to these rules. It is our belief that actual compliance with these rules would be materially lower than the theoretical compliance due to continuing changes in customer shipping requirements, delays in placing empty cars for loading,

insertion of rush orders resulting in revised mill schedules, etc.

Approximately 15% of our present empty car requirements are fulfilled by utilizing cars arriving under load with inbound material which are then emptied and reloaded. The number and ownership of such cars cannot now be forecast with any degree of accuracy nor could they be if Mr. Robinson's proposals were effectuated. Furthermore, under Mr. Robinson's plan all empty cars required for shipments would have to be ordered in advance. Consequently, cars made empty by unloading could not be used on the day available and would thus be returned to the delivering trunk line. Simultaneously the other empty cars previously ordered would be arriving for outbound loads. Certainly this would increase the volume of empty car movements and substantially increase the complexity of railroad switching service. The net result would be an over all loss of efficiency which would result in deterioration [9] of our railroad service and thus substantially interfere with our present operations.

In addition, we have today, and undoubtedly will continue to have, many orders which require shipment via what Mr. Robinson would classify as car short railroads. The delays encountered in the placement of suitable empties from these roads will also create major problems which will produce additional interference with our shipping capabilities.

Finally, based on our studies of possible compliance, we estimate that the application of these rules would reduce our shipping operations by a minimum of 40% of present rail shipments. To avoid reducing our production capabilities it would be necessary to transfer our shipments to another mode.

II.

PROPOSAL II

CAR SERVICE RULES 11 AND 13

If accepted, these proposed rules would place assigned cars on per diem (and thereby demurrage) immediately upon arrival at a loading point.

EX PARTE 241
WITNESS: F. B. VARNER
EXHIBIT I
Page 1 of 3

EX PARTE 241
ESTIMATED MAXIMUM POSSIBLE COMPLIANCE
WITH PROPOSED CAR SERVICE RULES 1, 2, 3, 4

	Facility			
	Clairton Works Clairton, Pa.	Homestead 100" Mill Hstd., Pa. (2)	National Works McKeesport, Pa.	South Works Structural Mill So. Chicago, Ill. (2)
Period Studied	8/30-9/3/66	8/29-9/2/66	8/28-9/2/66	8/8-8/12/66; 8/15-8/19/66
Total Loads	118	137	224	445
Total Empties Now Reduced to 24-Hour Supply	118	137	224	445
Estimated Number which could comply (1)	70	98	167	171
% Compliance Theoretical	59%	72%	75%	38%
% Range of Daily Theoretical Compliance	54%–68%	62%–93%	60%–83%	28%–52%

(1) Estimated possible compliance is determined by taking empty cars, by ownership and by furnishing carrier, and comparing with outbound loads for following day. The following bases are used:

A. Car was actually used in compliance with proposed rules.

B. Alternate car was available for use in compliance with proposed rules.

C. Alternate route could have been used to permit use of an available car in compliance with proposed rules.

(2) Where the facility studied is a part of a larger facility using the same empty car pool, empties available have been allocated in the same proportion that loads bear to each other. Viz: The 100" Plate Mill at Homestead is one of three facilities drawing empty cars from Hays Yard. The 100" Mill loads for the study period were 50% of total loads for the three facilities, after adjustment for empties coming from other sources. See Exhibit Ia for details of facilities and empty sources. 50% of the empties in Hays Yard are, therefore, considered to be available for the 100" Mill. Empties of lines having a direct connection with the Union RR were reduced by 50%. Other empties were allocated as close to the 50% basis as possible. The total empty car supply was proportionately reduced to an average 24-hour car supply. This was done to create conditions comparable to those which would exist under Ex Parte 241, Proposal II, Rules 1, 2, 3, and 4.

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Transportation & Movement Services

[3] enforceable by making carriers and shippers who violate them subject to penalties therefor, the same as for violating any other tariff provisions. While we have no objection to this, we believe the rules themselves should contain a directly stated penalty as suggested in my original verified statement herein dated July 1.

As also indicated therein, we are of the opinion that the single most constructive action which can be taken to expedite the movement of freight cars and alleviate the car supply, is an updating and modernization of the car service rules. In that verified statement, we suggested certain rules for adoption in lieu of present car service Rules 1, 2 and 3.

Based on information developed in the record in Ex Parte 241 thus far and comments, criticisms and suggestions, received from various parties, we have made certain revisions in our suggested rules. We now wish to offer them for consideration in lieu of present car service Rules 1, 2 and 3 and in lieu of Robinson's proposed car service Rules 1, 2, 3 and 4. Our present proposal in this respect is as follows:

Proposed Car Service Rules

1. The Class I line haul carrier which is the initial such carrier transporting any loaded car is responsible for providing shippers on its line and its switching and Class II short line connections a sufficient supply of the kind of cars required for loading their products.
2. Where cars of foreign ownership having been made empty on the serving line are available for prompt placement for loading by shipper in accordance with the provisions of Rules 3, 4 and 5 and Notes 1 and 2 below, they must be utilized before the line haul carriers own ownership.
3. Except as otherwise provided in Rules 4 and 5 and Notes 1, 2 and 3 below, or as provided by specific written agreement between an origin owner or lessee carrier and other carriers over which its cars move; the following shall govern:

(a) Cars loaded to a destination in the same state or to a destination in an adjoining state must be promptly returned to the owning or leasing line immediately; loaded if possible, otherwise empty. If loaded, they may be destined to any point served by origin carrier and its switching and Class II connections. If empty, they must be returned to origin carrier at junction from which received or other junction closer to the destination at which unloaded.

(b) Cars loaded to a point of destination outside of origin state and states immediately contiguous thereto may be loaded to any point of destination in any state served by the owning or leasing line. Upon being unloaded at this destination, cars are then subject to paragraph (a).

4. When origin carrier's requirements necessitate, origin carrier may require direct return of empty equipment to its line by endorsing waybill covering loaded movement, "when unloaded, return directly either loaded or empty to owner."

5. Origin carriers at their option may assign certain cars to pools at points where they deem it necessary in order to maintain a sufficient car supply. Waybills covering loaded movements of such assigned cars must be endorsed either (1) "Assigned car, when empty, return to agent at origin of last load via reverse of outbound route," (2) "Controlled car, when empty, return to owning or leasing carrier at junction from which received," or (3) "Controlled car, when empty return to owning or leasing carrier at junction closest to destination at which unloaded."

6. All empty movements of cars covered by Rules 3, 4 and 5 shall be accompanied by revenue form of waybill without charges, showing full routing by railroads and junction points.

7. Where cars are placed for loading and loaded contrary to any provisions to Rules 3, 4 and 5 (except as specifically permitted by Notes 1, 2 and 3 herein), the line responsible will pay to the owning line an amount equal to the per diem payments on the car from the time car is misloaded until it is completely unloaded and released from that shipment. This is a penalty charge and is in

addition to per diem normally due the owning line by the using line.

NOTE 1: Where two or more line haul carriers serve the same plant in originating traffic or where a plant is served by a switching line or a short line whose operations in serving the plant are essentially in the nature of switching and where such switching or short line connects directly with two or more line haul carriers, such line haul carriers and such shippers or such line haul carriers and such switching or short haul carriers may by mutual agreement (except for cars subject to Rules 4 and 5 above) provide for shipping loaded cars out without regard to carrier actually supplying a particular car for loading. It is contemplated that such agreements will be subject to such reasonable conditions as will be equitable to all the parties, such as a requirement that the total number of loaded cars shipped via a given line haul carrier in a particular period must balance with the total number of empty cars supplied by that carrier during the same period. Cars loaded and forwarded under the provisions of this note are subject to the balance of these rules the same as any other car.

[5] NOTE 2: Except as to cars covered by Rules 4 and 5 above, where a car received loaded by a particular plant or industry can be promptly reloaded by that industry without the necessity of it being removed from its plant tracks and again placed by the carrier switching the plant, it may be so reloaded without regard to the provisions of Rules 3 and 4 above.

NOTE 3: Rule 3 above does not apply at reconsigning points to car reconsigned with original lading under duly published tariffs.

We agree thoroughly with Witness Robinson that car service rules are of little value unless they are definite and enforceable. However, we believe that our above suggested Rules 1-7 and Notes 1, 2 and 3 which we offer in substitution of Witness Robinson's proposed Rules 1-4 will do a better job of getting foreign cars returned to the home roads and at the same time are more flexible in recognizing the practical situations with which shippers and carriers are confronted in accomplishing this.

* * * * *

(Wheeling Steel Corporation)

[2] Wheeling Steel is a heavy user of rail transportation receiving approximately 50,000 cars annually of inbound raw material and shipping approximately 40,000 cars annually of outbound products. This represents 90 per cent of our inbound movement and 40 per cent of our outbound.

Our products range from ten and fifteen-ton coils of steel to small galvanized containers weighing two or three pounds. All of our rail shipments are in carload lots requiring for the most part, open and covered bar or coil type gondolas, damage-free box cars, cushioned underframe box cars and standard box cars.

Our ability to secure the proper type and adequate number of rail cars is just as essential to the economic growth of our Corporation as increased production and sales.

It is evident that we are quite dependent upon common carrier rail service and are therefore, very concerned with the rules proposed in Ex Parte 241. We have felt the impact of the national car shortage and would welcome any action which would improve car utilization, distribution, rules, and practices. We do not, however, feel that by imposing on the carriers all of the sixteen rules submitted by the Interstate Commerce Commission Bureau of Railroad Safety and Service that the desired ends will be realized. In fact, it is our belief that the carriers, if forced to abide by certain of these rules, will find themselves devoting more manpower and more motive power to the juggling of empty equipment between themselves and increasingly less to the movement of loaded equipment and terminal services required by the shipper, thereby impeding the efficient flow of traffic.

It has always been the practice of Wheeling Steel Corporation, whenever possible, to adhere to the principles of proposed Rule 1; however, should [3] this rule become binding on the carriers, we can foresee situations that would hamper the expeditious placement of cars at our mills. For example: It could require several hours and several additional switches should a car actually be placed for loading, only to find that the load for this particular car requires it to move off the home road. For this reason, we cannot see

how strict adherence to this rule could accomplish anything but further delay in yard handling.

The blanket application of Rules 2 and 3 on all carriers for all types of equipment, does not, in our opinion, seem reasonable. As you no doubt are aware, the vast majority of inbound materials for the steel industry are handled in open top equipment. In many instances, this same equipment is utilized in outbound loading, such as inbound stone cars loaded out with coke.

The railroads have designed specific cars such as covered coil cars and damage free box cars for safe handling of steel and steel coils. These cars helped return a large part of the coiled steel traffic to the railroads. To include this special equipment under the proposed rule 3, would reverse the whole effect and force a large portion of this business back to the motor carriers.

A large number of hopper and gondola cars are used exclusively to move ore, coal, and stone to steel mills. A number of these cars are not suitable for other purposes. Movements are in train-load quantities and the proposed rule 3, would undoubtedly interrupt or hinder this flow of raw materials and affect our production schedules.

As the evidence gathered in the course of this investigation shows, the type of equipment contributing most to the national car shortage is box cars. How then would compliance with Rules 2 and 3 accomplish anything [4] but force the movement of open top and special equipment cars away from the area where they might be better utilized.

* * * * * *

Unlike some process industries, practically all of our products are made to customers' requirements which include specified gauges, widths, and metallurgical properties; also, weights and sizes of coils and varying dimensions of steel sheets. However, when these orders are completed, we must hold them subject to instant release by the customer. This practice of holding material is common throughout the industry and necessary to meet surge demands by certain industries such as the can manufacturers prior to the canning season and by the automobile producers with the introduction of new models. This means that we do not know, much of the time, what we will be required to ship within a coming 24-hour period.

[5] As an example, our Yorkville Mill is primarily a pro-

ducer of Tin Plate. We load approximately 350 cars per month, shipping to all points in the United States. Railroad cars are ordered in advance for specific shipping dates, but releases are not specific on 80 per cent of our orders.

In July, 1966, on four occasions, we had orders for releases for over 500 tons from two customers, stating that material must be shipped that day or they would seek releases from our competitors. We were able to oblige our customer by having some cars on hand at our mill, although part of the shipments went by motor carrier.

Therefore, it is apparent that because of the nature of our business, it would be extremely difficult, if not impossible, to comply with Item 1 of Rule 12.

So far as Item 2 is concerned, the railroads, in every instance, accumulate the information requested from the Bills of Lading which they furnished, covering an actual movement of loaded or empty cars.

Rule 16, Item 11, requires that—"(a) Each railroad will, with due regard for efficient railroad operating practices, hold no more cars for prospective loading at any time for any industry which it serves than those needed to protect current outbound loading, and where one or more other railroads also serve an industry, each railroad will arrange to prevent the aggregate holding of empty cars in excess of the industry's current needs".

"(b) The holding of empty foreign cars for prospective loading in excess of twenty-four hours, exclusive of Saturdays, Sundays, and Holidays, is prohibited."

Item II (a) would place an impossible hardship on our shipping procedures. The item refers to ". . . hold no more cars for prospective [6] loading at any time for any industry which it serves than those needed to protect current outbound loading . . . .".

The question is—what is considered current outbound loading? If this means twenty-four or forty-eight hours, we would be placed in a very precarious position. This is because a large amount of railroad equipment in our area is often unfit for loading. It is quite common to order in a dozen box cars and then have to reject all of them or possibly salvage one or two.

Inasmuch as cars are ordered into the plant around the clock because of three-turn shipping, it follows that a restricted car supply, often consisting of poor equipment,

can effectively shut down our shipping and even severely curtail our production. Therefore, the proposed rule would not only not benefit orderly car distribution, but would create havoc with the production of steel.

We want to again emphasize our desire to see corrective measures taken to alleviate the national car shortage. For the reasons stated herein, we cannot concur in the adoption of these proposed rules which, as we see it, would place an undue burden and penalize ourselves and many shippers who are not responsible for contributing to the national car shortage.

The imposition of these rules would force us to seek other modes of transportation.

R.V.S. No. 86—John J. McDermott

(Youngstown Sheet and Tube Company)

Statement of Position

[4] Youngstown, being a heavy user of rail car equipment, has a very substantial interest in rail car supply generally, and gondola car supply in particular. We have viewed with growing concern the decline in gondola car ownership over the past ten years, which is so graphically portrayed in Mr. Kline's statement. It is of particular concern to us that this reduction in ownership has been taking place when steel production has been increasing, as shown below:

Production of Ingots and Steel for Castings
(Millions of Net Tons)

1965	1964	1963	1962	1961	1960	1959	1958	1957	1956
131.5	127.1	109.3	98.3	98.0	99.3	93.4	85.3	112.7	115.2

From 1956 to 1965, inclusive, Youngstown has spent in excess of $644 million in capital additions and improvements. During the 1965-1968 period, Youngstown has programmed additional expenditures of $375 million for capital additions and improvements. In the Chicago area alone, currently authorized expenditures by the steel companies for new and improved facilities exceed $1.6 billion.

Youngstown shares the Commission's concern with car shortages and has studied with interest the reports and recommendations of Commission staff members. There can be little question that inadequacy of car ownership is

the largest single factor contributing to critical car shortages during periods of high production. It seems equally clear that the car shortages are aggravated by deficiencies in car distribution and handling practices, including [5] slow movement. The most critical shortages have been those affecting box cars, and the Commission's investigation to date has been directed primarily to box car ownership, supply and demand, and abuses in the distribution and utilization of such cars. It is also a matter of record that the majority of car service orders promulgated by the Interstate Commerce Commission in recent years to alleviate critical shortages of cars in various sections of the country have been directed principally at the box car category.

Youngstown believes that the conditions affecting the utilization of gondola cars throughout the country are different in many respects from those affecting box car utilization, and that the remedies recommended by staff members of the Commission, which are based primarily on their studies of box car utilization, would not achieve the desired results with respect to gondolas. If applied to gondola cars, these remedies would, in our opinion, result in wasteful practices, and have an overall effect opposite to that which is desired. Their application to gondolas would reduce, rather than increase, the utilization of this type of car, and greatly enlarge the problems presently associated with an already tight car supply situation. We view with great alarm the predictable adverse effects which the adoption of the proposed car service rules would have on Youngstown's ability to produce and ship steel.

For the reasons detailed later in this statement, it is the position of The Youngstown Sheet and Tube Company that gondola cars should be exempted from the provisions of the car service [6] rules proposed by staff members of the Interstate Commerce Commission as a means of alleviating car shortages, should the Commission adopt those rules for general application.

Youngstown subscribes to the statement filed in this proceeding filed by the American Iron and Steel Institute and Youngstown's statement is intended to support and amplify the statement filed by the Institute in so far as the proposed car service rules would affect this Company.

IV

The Characteristics of Steel Production and Shipment

Something of the nature of steel production and shipments should be understood at the outset. Although steel is produced in very large tonnages, individual orders may vary greatly with respect to quantity, specifications and chemistry of the steel, sizes, end-use, packaging and destinations. For the most part, each order received by Youngstown is tailor-made to the individual specifications of our customers. This manner of ordering and production does not lend itself to warehousing of large stocks of steel items and in fact, with the exception of a few specifications of pipe and some secondary quality sheets, Youngstown does not stock steel and maintains no warehouses at its plants for this purpose. The design of our steel finishing facilities is predicated on the concept of an even flow of product across our shipping room floors to transportation equipment. The amount of [7] shipping room space is, therefore, limited even in our newest and most up-to-date facilities.

Many of our steel products are perishable in nature, subject to rusting and deterioration if stored, or if exposed to changes in temperature and humidity. The element of time between the last finishing operation performed in our plants and delivery to a customer is of great importance. It can be, and often is, a factor in a customer's acceptance or rejection of a product. The trend to the maintenance of lower inventories on the part of our customers is also a factor necessitating prompt shipment.

Extened delays in obtaining transportation equipment must result in a curtailment or shutdown of our operations, storage of product outside of our plant property or diversion to other modes of transport. It follows, therefore, that car supply is of vital concern to us at all times.

Orders received by Youngstown from our customers in almost every case specify a delivery date requirement. These are usually given in terms of a specific week, the early, mid or late part of a specific week or, in the case of some items, specific shipping dates are requested. In some cases, orders are received by us solely on the basis of our ability to ship within a very short lead time. Orders are fitted into our production schedules in accordance with the promised shipping dates or time periods.

[14] *Effect of the Proposed Car Service Rules on the Operations of the Indiana Harbor Plant*—The proposed car service rules would do away with the national pool concept. They would require compatibility of car ownership and routing. If the proposed rules were adopted, Youngstown believes it would have two alternative procedures with respect to the acquisition of equipment required for shipments.

1. To assure getting cars of the proper ownership, order 100 per cent of loading requirements from the serving railroads as empties. This would mean the release to the railroads as empties of all inbound cars after unloading.

2. Endeavor to match inbound car ownership to outbound destinations, releasing as empty those inbound cars not compatible with routing and destination.

Even if Youngstown could be assured of obtaining from its serving railroads all of the empty cars needed for its use, the first alternative would seem to be completely impractical from the standpoint of the greatly increased switching which would be necessary both internally in our plants and externally on the serving railroads. We believe that further elaboration on this point is not necessary when we look at another aspect of this alternative; that is, the source of the cars themselves when considered in the light of the ownership of those lines which under the proposed car service rules would be required to furnish our car supply.

Under the proposed car service rules, the obligation to provide cars to Youngstown would rest primarily with the following [15] Northwestern District, Centralwestern District, Eastern District and Southern District railroads whose ownerships of ordinary mill-type gondolas as of October 1, 1964, are shown below: These are the railroads which have direct connections with the switching lines serving the Indiana Harbor plant.

AT&SF Railway	7877
C&EI Railroad	753
CB&Q Railroad	2654
CGW Railway	311
C&NW Railway	3736
CRI&P Railroad	3627
CMSTP&P Railroad	4842
EJ&E Railway	4536

GM&O Railroad	1818
IC Railroad	3198
Monon Railroad	411
N&W Railway	9746
Soo Line Railroad	1492
TOTAL	45001

The total ordinary mill-type gondola ownership of these fourteen railroads constitutes approximately 29.8 per cent of the total Class 1 railroad ownership of this class of car.

Historically, the gondola has been the work horse of the Steel Industry, and this is reflected in the greater gondola ownerships of the Eastern railroads, who collectively own approximately 48 per cent of the nation's gondolas. Youngstown's [16] Indiana Harbor plant has in the past relied in very large degree on gondolas of Eastern railroad ownership to ship its products even though the majority of such rail shipments are destined to points west of Chicago. When we consider that Youngstown is only one of the steel companies forming the huge steelmaking complex of the Chicago district and that the gondola requirements of the other companies in the Chicago district would have to be met primarily by the fourteen railroads listed above, it is very doubtful that these roads could meet our requirements should we cut off from the majority of cars owned by Eastern district railroads.

The second alternative, under which we would endeavor to match inbound car ownership to outbound product shipment destinations, would place an even greater internal switching burden on Youngstown than the first alternative. Youngstown's interchange tracks with the serving railroads and its plant track facilities have been geared to the traditional method of treating gondolas as a national pool. The increase in switching which would be made necessary by the second alternative would far exceed our present switching capabilities, both in terms of power and track capacities. While it is true that additional locomotive power could be added at Youngstown's expense, it is in many cases physically impossible to increase our track capacities because of space limitations.

* * * * * *

[18] On this very confined property are located the Company's main steelmaking facilities in the Youngstown dis-

trict, comprising four blast furnaces, twelve open hearth furnaces, a blooming mill, skelp mill, hot strip mill, cold strip mill, two seamless pipe mills, a continuous weld pipe mill, a sinter plant, ore yard, scrap storage yard, storage areas for semi-finished products, steam plant, machine, welding and blacksmith shops, motor pool maintenance buildings, and other buildings and offices ancillary to the operation. 65 per cent to 70 per cent of the total plant area is under roof. Plant expansion over the years has necessitated the use of every square foot of the property, and there is no room for additional expansion.

All of the Campbell's plant's steelmaking and finishing facilities are served by rail. There are 142 separate railroad tracks in the plant, comprising in total approximately 80 miles of railroad.

This plant is served directly by the Baltimore and Ohio, the Pennsylvania and the Pittsburgh and Lake Erie Railroads. The Erie Lackawanna and New York Central Railroads have access to the plant through reciprocal switching. The Baltimore and Ohio and Pennsylvania Railroads serve the plant through the West end, and the Pittsburgh and Lake Erie Railroad has access through both the East and West ends of the plant.

* * * * *

[21] *Campbell Plant Shipments*—The major products of this plant are hot and cold rolled sheets and seamless and continuous buttweld pipe. The pipe shipments move predominantly by railroad and ordinary mill-type gondolas are used almost exclusively in rail shipment of pipe. Average monthly shipments of this product alone vary between 700 and 900 carloads.

Source of Gondola Car Supply for the Campbell Plant—During the month of August, 1966, the Campbell plant shipped 1,275 cars of product and semi-finished material in gondola cars of railroad ownership. Of this total, 341 gondolas were received from the serving railroads as empties for outbound loading. 934 cars, or 72 per cent of the total gondola car requirements, were obtained from inbound loads made empty in the plant. Inbound loaded gondola cars during the same period amounted to 1,699 cars.

The railroad ownership breakdown of the loaded and empty gondolas furnished to the plant by the serving railroads during the month of August was as follows:

Delivered by	No. of Different Reporting Marks	
	Loaded	Empty
B&O Railroad	59	17
PRR Railroad	46	44
P&LE Railroad	51	18

Seventy-one separate reporting marks are included in these figures, which involve cars of sixty-five different railroad system ownerships.

[22] *The Effect of the Proposed Car Service Rules on the Operations of Youngstown's Campbell Plant*—The extremely crowded conditions in this plant and its neighboring railroad yards at the present time do not permit anything like desirably efficient switching service. This lack of a desirable level of efficiency results in a disproportionate cost burden associated with these services on the Company's overall production costs in the Youngstown district. This particular cost factor, among others associated with older steelmaking facilities, including the lack of direct access to water transportation, contributes to the generally higher level of costs of producing steel in the Youngstown district. These higher costs are reflected not only in the Company's earnings statements but, as is generally recognized, have a profound effect on the whole economy of the Mahoning Valley, and the Youngstown area in particular. When demand for steel lags, or is at a low level for sustained periods, production at the higher cost plants is cut back sooner, or shut down entirely for longer periods, than at newer, lower cost facilities.

As has been shown above, the greater part of our gondola requirements for outbound loading is obtained from inbound loaded cars made empty in the plant. If it were to become necessary for us to switch these cars back to the serving railroads after they had been unloaded, and then re-order empty cars by ownership for our outbound loadings, the added switching burden, even if it could be sustained by the serving railroads (which is extremely unlikely), [23] would be intolerable to Youngstown. The large amount of additional switching which would be necessary simply could not be accomplished within the limited confines of our present yards and plant trackage, and since room for expansion does not exist, the effect on our opera-

tions would be immediate and drastic. Our rail shipments would, of necessity, be greatly reduced. Practically no relief could be obtained through a change to alternate means of transportation because we have no direct access to water transportation, and the truck loading facilities in our pipe mills are very limited. Even if truck loading on a large scale were possible, shipment by truck of a large proportion of our pipe production would be impractical because of the generally more distant markets and the economics of that type of transportation.

A large part of our operations at the Campbell plant would be placed in jeopardy if rules requiring the prior ordering of empty gondola cars for outbound loading by destination and route were to become mandatory. The total effect on the operations of this plant, and the thousands of jobs which would surely be affected, would be difficult to exaggerate.

* * * * *

VII.

Youngstown's Brier Hill Works Located at Youngstown, Ohio

[24] An aerial photograph showing the general layout of the Brier Hill Works is attached as Exhibit . . (JMcD 3).

This plant contains a blast furnace, twelve open hearth furnaces, a blooming mill, a round mill, a cold drawn bar mill and an electric weld tube mill. There is also an iron ore storage yard, a coke plant, various scrap and semi-finished steel storage areas, as well as offices and other ancillary facilities.

The total plant area comprises 210 acres of land, a long narrow strip bounded by the Mahoning River on the South and by railroad yards on the North. As is the case in our Campbell plant, operations are confined and space is at a premium.

This plant is served directly by the Baltimore and Ohio, the Erie Lackawanna, the Lake Erie and Eastern and Pennsylvania Railroads.

* * * * *

[26] The pipe from this tube mill is shipped to all sections of the country and cars are frequently routed in specific conformance with the requests of our customers.

The operations of this plant are entirely dependent on an uninterrupted flow of long gondola cars. The ownership of this class of cars is very limited and unevenly distributed between the railroads serving the plant. Compliance with proposed Car Service Rule 12 would be impossible if for no other reason than the extreme tightness in the supply of this type of car. Apart from the very serious consequences arising from the almost sure curtailment or shutdown of our operations at this plant should proposed Car Service Rule 12 be made effective, we are convinced that overall utilization of this class of car would be very adversely affected, and this is surely not a sought-for result.

VIII

Conclusion

In summary, it is the position of The Youngstown Sheet and Tube Company that:

1. The prescription by the Commission of Mr. Robinson's proposed Car Service Rules 2, 3, 4 and 12, for application to gondola cars, is not justified by any substantial evidence. Conditions affecting the ownership, supply and distribution of gondola cars differ from those affecting box cars.

2. The publication of these Car Service Rules in tariff form would impose an unwarranted and undesirable rigidity on the [27] operations of carriers and shippers alike, and would greatly hinder, rather than help, maximum utilization of gondola cars.

3. Mandatory compliance with proposed Car Service Rules 2, 3, 4 and 12 would severely disrupt the operations of The Youngstown Sheet and Tube Company, and others, without any apparent beneficial results.

"Stipulation of M. Lauck Walton and Elmer B. Trousdale"

* * * * *

[4015] Mr. Trousdale: May the record show that Witness Steinbright of the Northern Pacific, VS 16, has been excused, in that no one now desires to cross-examine him.

Exam. Sweeney: Yes, the record so shows.

Mr. Walton: Mr. Examiner, I am not certain the record shows precisely what portions of Mr. Steinbright's testimony are not to be treated as evidence. There is a portion in addition to the part marked "Argument." It was agreed between Counsel for the Northern Pacific and myself that I would waive cross-examina- [4016] tion if that portion of VS 16 beginning on the bottom of page 12 and extending through to the end of page 14 were struck. It starts "6. Other practices, or changes in practices," in the heading on the bottom of that page 12.

Mr. Trousdale: It is my understanding that that agreement is in accordance with the understanding of the Northern Pacific, Mr. Examiner.

Mr. Walton: That will then not be treated as evidence.

Exam. Sweeney: I think we have already gone over this, haven't we?

Mr. Walton: No, sir. We discussed the portion that related to the argument submitted by the Northern Pacific. That also would not be treated as evidence, and we discussed this off the record.

Exam. Sweeney: I have a recollection of crossing that part of the statement off. It is clear now, anyway.

* * * * *

BRIEF ON BEHALF OF THE BUREAU OF ENFORCEMENT, FILED NOV. 13, 1967 (PP. 88-90)

[88] * * * Some express the opinion that plants, particularly those long established in congested industrial areas, could not continue operations. RVS 86 pp. 23-24. Persuasive of problems involved are the circumstances at Youngstown Sheet and Tube's Indiana Harbor plant and Campbell, Ohio, works. RVS 86, p. 10-24, Exhs. JMcD 1 and 2.

The inadequacy of the serving lines' car fleets to meet the demands of the plants seems to be the primary problem so far as car supply is concerned, partly because the serving lines complement of gondolas of all types is insufficient, (RVS 58 p. 3; RVS 86, p. 4), and partly because the national fleet of gondolas of 60 foot or greater length, which are required for the singlecar loading of structural steel, and of special equipment for plate, wire and coils, is insufficient, (RVS 86. pp. 24, 25, 26). The problem as to structural products is particularly acute at Bethlehem's, Bethlehem, Pennsylvania, plant which is served by the Reading, the Central of New Jersey and the Lehigh Valley, whose total ownership of gondolas will not meet [89] the steel company's day-to-day demand, (RVS 58, p. 5). Bethlehem must, therefore, depend for its supply on the regular direction of gondolas made empty on the Eastern Seaboard to the serving lines. RVS 58, pp. 6-7. Since the Reading, the Central of New Jersey and the Lehigh Valley are in financial difficulties it is not expected that they singlehandedly can respond to any inducement or pressure to increase their ownership, certainly not of the type of car required for efficient service. RVS 58, p. 6. It is proposed by Youngstown that gondolas be expected from any mandatory car service rules. RVS 86, pp. 5-6.

At many plants the routing requirements would to some extent affect efficiency of utilization of the car fleet. Where, as is the case at plants whose inbound freight, such as scrap iron, is received in gondolas, there is a high percentage of cars made empty within the industry track facilities which can be loaded outbound without involving car days and expense in switching empties out and into the plant required for selective loading by ownership. RVS 58, p. 6; [90] RVS 86, p. 22. At Youngstown's Indiana Harbor plant

approximately 60% of the cars originated have been derived from inbound loads. RVS 86, p. 13.

Although, since scrap iron comes into the plant from origins on diverse railroads (RVS 86, p. 13) and since the greater the number of inbound cars the greater the supply of diverse ownership, conditions at such a plant would seem to offer an opportunity for the use of foreign cars in compliance with the rules, the preponderance of flow of traffic inbound and outbound at plants in the Chicago area is a factor limiting the opportunity for compliance.

It is recognized that the rules may not enhance the return loading of foreign cars, (although this is doubtful since there apparently is a general indifference to Rule 1), this, the Bureau believes, does not justify a denial of control of cars to the owner.

* * * * *

[89] There is only one feasible way to operate the railroads under a mandatory system of car service rules. The Chairman of the AAR Car Service Division must be allowed to grant exceptions to the rules whenever literal compliance would be detrimental to or frustrate the objectives of the rules, with the possible proviso that, should the Commission desire to retain overall supervision of such procedure, all exceptions granted shall be filed with the Commission by the Chairman and be subject to suspension or cancellation. Specifically, the railroad respondents request that if the Commission should, on reconsideration, adhere to the Division's view that the AAR Car Service Rules specified in its report in this proceeding should be prescribed as mandatory, then the following provision must also be prescribed as an integral part of the same set of regulations:

> "§ 1033.19—*Exceptions* (*Rule 19*)
>
> Exceptions to these rules for the purpose of further improving car supply and utilization, increasing availability of cars to their owners, improving the efficiency of railroad operations, or alleviating inequities or hardships, may be authorized by the Chairman of the Car Service Division, Association of American Railroads. Such exceptions as are authorized by said Chairman shall be filed with the Bureau of Operations, Interstate Commerce Commission, and shall be subject to suspension or cancellation by the Commission."

[90] It is contemplated that under the foregoing regulation, the Chairman of the AAR Car Service Division would file with the Commission a numbered series of exception circulars or orders, each effective when issued and subject to suspension or cancellation by the Commission. Under this arrangement a formal pleading would not be necessary nor a formal order of the Commission. As a practical matter, it is expected that the Chairman of the AAR Car Service Division would continue to work with and furnish such information concerning the purpose of or necessity for any exception authorized, as the Bureau of Operations

might desire. Under this arrangement and regulation, the Commission would retain the ultimate veto power over all exceptions permitted to the rules. This is not considered to be an unauthorized delegation of authority by the Commission as similar procedures have been followed in Bureau of Explosive matters, and on past occasions the Chairman of the AAR Car Service Division has been appointed as an Agent of the Commission under I.C.C. Car Service Orders (See *e.g.*, Service Order No. 944, dated July 17, 1963).

One of the primary purposes of the car service rules, as Division 3 recognized in its Report, is to allow the car owner to obtain the greatest productive use, consistent with efficient operating practices, of the car in which he has made his investment. But, there will be many times in the course of a year when car owners do not necessarily desire all cars of all types and classes to be returned home. Where there are seasonal fluctuations in harvests, a particular road may desire [91] to release its cars for a certain period of time for service, anywhere about the country, without regard to the car service rules, recalling them when its own need arises. There will also be numerous other instances involving emergencies or hardship, for example, when it would be desirable to load a car away from the direction of the home road, in which action the owner assents. It is thus probable that a general exception of such nature might be authorized by the Chairman of the AAR Car Service Division and filed with the Commission providing that a car owner may waive the mandatory application of car service Rules 1 and 2 by filing notice thereof, specifying car type, class or number and the duration of the waiver, with the Chairman of the AAR Car Service Division. It is contemplated that, while the general exception only would be filed with the I.C.C., individual notices of waiver would be filed (probably by road, each waiver serially numbered) with the Chairman of the AAR Car Service Division, so that a central record of such waivers would be maintained. The Chairman of the Car Service Division would advise member roads by circular or otherwise that the cars of that series were "free" cars which could be loaded without regard to requirements of Rules 1 and 2 until the specified deadline dates. On the other hand, the waiver might be specific, even pertaining to a single car for a single trip. As an example of how such waivers might work, assume a pro-

posed westbound shipment of military explosives from the government arsenal at Hawthorne, Nevada, to a Pacific coast [92] port of embarcation in California, and that the only way in which the shipment can be accommodated immediately, and/or consistent with military deadlines, is to use several cars of New England roads' ownership to complete the move. The Superintendent of Transportation of the railroad serving Hawthorne, Nevada, which in this instance would be Southern Pacific, would ask for telegraphic approval of the specific New England roads to load certain cars for this movement. If agreeable, the New England roads would furnish telegraphic waivers, written copies of which would be filed with the Chairman of the AAR Car Service Division and there be subject to inspection or review.

This is not to suggest that the railroads invite the imposition of mandatory car service rules or the suggested exception arrangement as an improvement over present conditions. Quite to the contrary—it is our view that even the foregoing exception proposal would be cumbersome, burdensome, and expensive, and of unproven benefit to the railroad industry and to the shippers as a whole. However, such a procedure, cumbersome or burdensome though it may be, is far preferable to the alternative—mandatory rules which are impossible to fully comply with and no provision for exceptions.

* * * * *

NATIONAL TRANSPORTATION POLICY, 49 U.S.C. PROCEDING § 1.

It is hereby delared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

* * * * *

SECTION 1(14)(a) OF THE INTERSTATE COMMERCE ACT,
49 U.S.C. § 1(14)(a)

* * * * *

The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this part, including the compensation to be paid and other terms of any contract, agreement, or arrangement for the use of any locomotive, car, or other vehicle not owned by the carrier using it (and whether or not owned by another carrier), and the penalties or other sanctions for nonobservance of such rules, regulations, or practices. In fixing such compensation to be paid for the use of any type of freight car, the Commission shall give consideration to the national level of ownership of such type of freight car and to other factors affecting the adequacy of the national freight car supply, and shall, on the basis of such consideration, determine whether compensation should be computed solely on the basis of elements of ownership expense involved in owning and maintaining such type of freight car, including a fair return on value, or whether such compensation should be increased by such incentive element or elements of compensation as in the Commission's judgment will provide just and reasonable compensation to freight car owners, contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense. The Commission shall not make any incentive element applicable to any type of freight car the supply of which the Commission finds to be adequate and may exempt from the compensation to be paid by any group of carriers such incentive element or elements of the Commission finds it to be in the national interest.

* * * * *

SECTION 1(21) OF THE INTERSTATE COMMERCE ACT,
49 U.S.C. § 1(21)

The Commission may, after hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad

subject to this part, party to such proceeding, to provide itself with safe and adequate facilities for performing as a common carrier its car service as that term is used in this part, and to extend its line or lines: *Provided,* That no such authorization or order shall be made unless the Commission finds, as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier subject to this part which refuses or neglects to comply with any order of the Commission made in pursuance of this paragraph shall be liable to a penalty of $100 for each day during which such refusal or neglect continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

* * * * *

SECTION 4 OF THE ADMINISTRATIVE PROCEDURE ACT, 5 U.S.C. § 553

RULE MAKING

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

* * * * *

SECTION 7 OF THE ADMINISTRATIVE PROCEDURE ACT, 5 U.S.C. § 556.

HEARINGS; PRESIDING EMPLOYEES; POWERS AND DUTIES; BURDEN OF PROOF; EVIDENCE; RECORD BASIS OF DECISION

(a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

(b) There shall preside at the taking of evidence—

(1) the agency;

(2) one or more members of the body which comprises the agency; or

(3) one or more hearing examiners appointed under section 3105 of this title.

This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

(c) Subject to published rules of the agency and within its powers, employees presiding at hearings may—

(1) administer oaths and affirmations;

(2) issue subpoenas authorized by law;

(3) rule on offers of proof and receive relevant evidence;

(4) take depositions or have depositions taken when the ends of justice would be served;

(5) regulate the course of the hearing;

(6) hold conferences for the settlement or simplification of the issues by consent of the parties;

(7) dispose of procedural requests or similar matters;

(8) make or recommend decisions in accordance with section 557 of this title; and

(9) take other action authorized by agency rule consistent with this subchapter.

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. A party is entitled to present his case or defense by oral or documentary evidence, to submit re-

buttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

SECTION 8 OF THE ADMINISTRATIVE PROCEDURE ACT, 5 U.S.C. § 557.

INITIAL DECISIONS; CONCLUSIVENESS; REVIEW BY AGENCY; SUBMISSIONS BY PARTIES; CONTENTS OF DECISIONS; RECORD

(a) This section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title.

(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554 (d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issue on notice or by rule. When the agency makes the decision without having presided at the reception of the evidence, the presiding employee or an employee qualified to preside at hearings pursuant to section 556 of this title shall first recommend a decision, except that in rule making or determining applications for initial licenses—

(1) instead thereof the agency may issue a tentative decision or one of its responsible employees may recommend a decision; or

(2) this procedure may be omitted in a case in which the agency finds on the record that due and timely execution of its functions imperatively and unavoidably so requires.

(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—

(1) proposed findings and conclusions; or

(2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and

(3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

SECTION 10(e) OF THE ADMINISTRATIVE PROCEDURE ACT, 5 U.S.C. § 706.

* * * * *

SCOPE OF REVIEW

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party and due account shall be taken of the rule of prejudicial error.

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SUPREME COURT, U.S.
No. 71-227
FILED
AUG 13 1971

In the Supreme Court of the United States

OCTOBER TERM, 1971

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

ALLEGHENY-LUDLUM STEEL CORPORATION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JURISDICTIONAL STATEMENT

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

ALLEGHENY-LUDLUM STEEL CORPORATION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the district court (App. A, *infra*, pp. 13-26) is reported at 325 F. Supp. 352. The report of the Interstate Commerce Commission (App. C, *infra*, pp. 28-168) is published at 335 I.C.C. 264. The Commission's order of February 18, 1970 (App. D, *infra*, pp. 169-179) is published at 335 I.C.C. 874, and its order of March 18, 1970 (App. E, *infra*, pp. 180-183) is unreported.

JURISDICTION

The judgment of the three-judge district court was entered on March 18, 1971 (App. B, *infra*, p. 27). Notices of appeal were filed by the United States and the Interstate Commerce Commission on May 17, 1971 (App. G and H, *infra*, pp. 204-207). On July 9, 1971, Mr. Justice Brennan extended the time for docketing the appeal to and including August 15, 1971. The jurisdiction of this Court is conferred by 28 U.S.C. 1253. *City of Chicago* v. *United States*, 396 U.S. 162.

QUESTIONS PRESENTED

The ultimate question presented is whether the district court erred in enjoining the enforcement of certain car service rules promulgated by the Interstate Commerce Commission, which generally require that freight cars be returned either loaded or empty in the direction of the railroads that own them, so as to increase the availability of freight cars to their owners. This involves the following subsidiary questions:

1. Whether the court below erred in holding that the general and pervasive shortage of freight cars on virtually all railroads is an insufficient predicate for the imposition of the car service rules, in the absence of explicit findings of shortages on the owner railroads, and of the financial ability of affected railroads to increase their car supply.

2. Whether the court below erred in holding that the practical necessity for some exceptions in the

day-to-day administration of the car service rules, recognized and provided for by the Commission, renders the rules invalid.

STATUTE INVOLVED

Section 1(14)(a) of the Interstate Commerce Act, as amended (49 U.S.C. (Supp. V) 1(14)(a)), provides:

> The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this part, including the compensation to be paid and other terms of any contract, agreement, or arrangement for the use of any locomotive, car, or other vehicle not owned by the carrier using it (and whether or not owned by another carrier), and the penalties or other sanctions for nonobservance of such rules, regulations, or practices. In fixing such compensation to be paid for the use of any type of freight car, the Commission shall give consideration to the national level of ownership of such type of freight car and to other factors affecting the adequacy of the national freight car supply, and shall, on the basis of such consideration, determine whether compensation should be computed solely on the basis of elements of ownership expense involved in owning and maintaining such type of freight car, including a fair return on value, or whether such compensation should be increased by such incentive element or elements of compensation as in the Commission's judgment will provide just and reasonable compensation to freight car owners, contribute to sound car service prac-

tices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense. The Commission shall not make any incentive element applicable to any type of freight car the supply of which the Commission finds to be adequate and may exempt from the compensation to be paid by any group of carriers such incentive element or elements if the Commission finds it to be in the national interest.

STATEMENT

This case involves one of a series of orders issued by the Interstate Commerce Commission at approximately the same time which attempt to meet the problems of freight car supply and distribution on the nation's railroads. Faced with an ever-increasing shortage of freight cars, which has been the subject of presidential [1] and congressional [2] concern, the Commission has sought to alleviate the crisis and to make more cars available for the use of shippers by such devices as establishing a new schedule of payment for the use by one railroad of another's cars (basic per diem); [3] adding an "incentive" element to the

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[1] See President Johnson's remarks upon signing P.L. 89-430, May 26, 1966, published in 2 *Weekly Compilation of Presidential Documents*, p. 690.

[2] See Hearings before the Freight Car Shortage Subcommittee of the Senate Committee on Commerce, 89th Cong., 1st Sess.

[3] *Chicago, B.& Q. R. Co.* v. *New York, S. &W. R. Co.*, 332 I.C.C. 176, sustained on review *sub nom. Union Pacific R. Co.* v. *United States*, 300 F. Supp. 318 (D. Neb.), and *Boston and*

basic per diem charges to encourage the prompt return of equipment found to be in short supply;[4] promulgating rules requiring the complete unloading of boxcars, free of debris and dunnage, to permit more prompt reuse of the cars;[5] and increasing the use of its emergency powers to remedy critical equipment shortages.[6]

The car service rules here at issue were promulgated upon the basis of an extensive investigation into all phases of freight car ownership and the rules and practices governing their utilization and distribution (App. C, *infra*, p. 29). Finding that a car owner currently receives the use of its own cars on an average of less than once each month (App. C, *infra*, p. 55), the Commission concluded that there is little incentive for railroads to purchase larger fleets of general service freight cars, or to maintain the cars in good repair when the principal beneficiaries frequently are other lines *(ibid.)*. Indeed, the

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Maine Railroad v. *United States*, 297 F. Supp. 615 (D. Mass.), affirmed *per curiam*, 396 U.S. 27.

[4] *Incentive Per Diem Charges—1968*, 337 I.C.C. 183 and 217, sustained on review *sub nom. Long Island R. Co.* v. *United States*, 318 F. Supp. 490 (E.D.N.Y.), and reversed and remanded in *Florida East Coast Ry. Co.* v. *United States*, and *Seaboard Coast Line R. Co.* v. *United States*, 322 F. Supp. 725 (M.D. Fla.), appeal docketed, No. 70-279.

[5] *Consignee's Obligation To Unload Rail Cars in Compliance With Carriers' Published Tariffs* (Docket No. 35237, decided Feb. 18, 1970), appeal pending *sub nom. A. E. Staley Mfg. Co.* v. *United States* (C.A. No. 4-69 Civ. 459, D. Minn.).

[6] See, *e.g.*, *United States* v. *Southern Ry. Co.*, 364 F.2d 86 (C.A. 5), certiorari denied, 386 U.S. 1031.

Commission noted that a railroad that owns a sufficient number of cars to satisfy its own shippers (hereinafter "owner lines") may suffer more serious shortages than lines with a deficient ownership of cars (hereinafter "non-owner lines") *(ibid.)*.

The rules promulgated by the Commission, adapted from a "Code of Car Service Rules" long maintained by the Association of American Railroads (AAR), require that empty freight cars be returned, with or without a load, in the direction of the owning line.[7] Such rules, the Commission found, will in the long run reduce empty car miles (App. C, *infra*, p. 67) and, moreover, will place the improved utilization of cars within the control of the owner who can then provide for the needs of its shippers for whom the equipment was acquired (App. C, *infra*, p. 65). Recognizing that a need for exceptions to the rules may arise, the Commission authorized the railroads to resolve inequities by negotiation (App. C, *infra*, p. 65; App. D, *infra*, p. 172), and further empowered certain Commission officials to authorize exceptions "for the purpose of further improving car supply and utilization, increasing availability of cars to their owners, improving the efficiency of railroad operations, or alleviating inequities or hardships" (App. D, *infra*, p. 172).

On review of the Commission's order, the district court agreed that there is substantial evidence of a

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[7] Rules 1 and 2, which the district court enjoined the Commission from enforcing, are reproduced in the district court's opinion (App. A, *infra*, pp. 15-16, n. 3).

general freight car shortage (App. A, *infra*, p. 20). The rules requiring the return of cars in the direction of the owning line were nevertheless held invalid on the grounds that the Commission had not found that the shortage was more acute on the owner lines than on non-owner lines (App. A, *infra*, p. 19), and that the Commission had failed to consider the financial capability of the railroads to augment their freight car supply (App. A, *infra*, p. 21). Noting that the Commission had conceded that as a practical matter there could not be complete observance of the mandatory rules, the district court also found it objectionable that the imposition of criminal penalties could be dependent upon Commission officials' determinations whether to grant exemption from the rules in certain instances (App. A, *infra*, p. 25).

On June 7, 1971, after the court below had decided this case, another three-judge district court sitting in Florida upheld the same rules, expressly refusing to follow the decision of the district court in this case. *Florida East Coast Ry.* v. *United States*, M.D. Fla., No. 70-182-Civ-J (App. F. *infra*, pp. 184-203), notice of appeal filed August 3, 1971.

THE QUESTIONS ARE SUBSTANTIAL

1. Probable jurisdiction should be noted in order to resolve the conflicting decisions of the two district courts concerning the validity of the Commission's car service rules. The rules at issue govern the disposition of freight cars of all the nation's railroads. Such rules must be uniformly applied to all roads to

avoid discrimination and inequities. In their current posture, the rules have been sustained by a district court in Florida and invalidated by a district court in Pennsylvania. The uncertainty arising from these conflicting lower court decisions warrants plenary review and resolution by this Court. Cf. *United States* v. *O'Malley*, 383 U.S. 627, 630; *Bingler* v. *Johnson*, 394 U.S. 741, 748.

Apart from the conflict in the district courts' decisions, this case presents important issues of federal transportation law having pervasive effect upon all rail carriers, as well as shippers and consumers, in the nation. The seriousness of the current freight car shortage cannot be doubted. Between 1955 and 1964, the total number of freight cars owned by railroads in the United States declined by some 210,000, or more than 12 percent (App. C, *infra*, at p. 36). The decline in ownership of general service boxcars was even more precipitous, falling more than 22 percent during that 10-year period *(ibid.)*. This decline in the number of cars was only partially offset by a corresponding increase in the size or capacity of the cars in use; during the same period the aggregate capacity of freight-carrying cars declined by approximately 5 percent *(ibid.)*.[8] As a result, what was once a freight car shortage only during certain peak shipping months of the year has become a critical year-around shortage (App. C, *infra*, p. 43). While

[8] The trend has continued unabated since the close of the record in this case, and no sign of improvement is apparent (see 84th Annual Report of the Interstate Commerce Commission at 131 (1970)).

the car service rules here at issue do not offer a complete solution, they are an important part of the Commission's total effort to alleviate the car shortage problem that continues to plague the nation.

2. The district court's objections to the rules are not well founded.

a. The court below erroneously held that a rule requiring the return of cars in the direction of the owning road must be predicated upon a specific finding of special car shortages on the owner lines (App. A, *infra*, p. 20), and faulted the Commission for failure to make such a finding.[9] But, as the three-judge district court in Florida recognized in *Florida East Coast Ry., supra*, the "question is not * * * whether the shortage on the owner lines is more acute, but rather who should get first call on the use of cars during a shortage" (App. F, *infra*, p. 201). The Commision's policy determination that, during a period of general car shortages, the owner lines should be afforded maximum use of their own cars (App. F, *infra*, p. 200), thus encouraging the purchase of additional cars by those lines that presently own an insufficient supply to meet the needs of their own shippers, was reasonable and an appropriate exercise of its judgment and discretion.

b. The lower court further held the car service rules invalid for failure "to consider the financial

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[9] This issue was never raised before the Commission; and thus was not properly before the district court. *United States v. Tucker Truck Lines*, 344 U.S. 33, 35.

effects upon the [non-]owner-lines [10] and the shipping public" (App. A, *infra*, p. 25). But given the chronic and pervasive freight car shortages, the Commission was justified in imposing car service rules designed to maximize the use of freight cars by their owners. In the absence of such rules, owner railroads and the shippers for whom those railroads purchase equipment would be penalized while non-owner railroads enjoyed the use of that equipment. The court below failed to recognize that placing the burden on railroads whose car supply is inadequate is not only equitable, but also provides an incentive for all railroads to maintain adequate car supplies (see App. C, *infra*, p. 55). Moreover, if the prompt return of cars to their owners would unduly burden a railroad in particular instances, it could apply for an exception—as expressly provided for by the Commission's rules to alleviate hardships.

The financial effect upon shippers was—contrary to the statement of the district court—expressly considered by the Commission, which concluded that any burden on shippers in terms of "extra switching and short delays" is overbalanced by the "overall benefit to be derived when originating lines obtain quick return of their system cars" (App. C, *infra*, p. 67). Thus the Commission "applied its familiarity with transportation problems to these conflicting considerations," *American Trucking Associations* v. *United States*, 344 U.S. 298, 314, and its conclusion that

[10] The court's opinion reads "owner-lines", but it is clear from the context that it meant to refer to non-owner lines.

the overall effect of the rules would be beneficial to both the carriers and the shipping public was an appropriate exercise of its "judgment in light of current facts," *American Trucking Associations* v. *Atchison, Topeka & Santa Fe R. Co.*, 387 U.S. 397, 410.

c. Finally, as the district court in Florida recognized in *Florida East Coast Ry., supra*, the fact that exceptions to the rules may be required in specific situations does not foreclose the Commission from promulgating a mandatory rule where, as here, adequate provision is made for granting such exceptions (App. F, *infra*, p. 201). And, contrary to the district court's apparent belief (App. A, *infra*, p. 25), criminal penalties do not automatically attach to every instance of non-compliance, since proof of criminal intent continues to be a necessary element of a criminal violation. Compare *United States* v. *Southern Ry. Co.*, 250 F. Supp. 759, 770 (D.S.C.), reversed on other grounds, 380 F. 2d 49 (C.A. 4).

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted.

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AUGUST 1971.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 70-731

ALLEGHENY LUDLUM STEEL CORPORATION, ET AL.

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION

Before ALDISERT, *Circuit Judge*, MARSH, *Chief District Judge*, and MILLER, *District Judge*.

OPINION OF THE COURT
[Filed March 18, 1971]

ALDISERT, *Circuit Judge.*

The Interstate Commerce Commission has promulgated mandatory rules governing the manner in which empty freight cars in the possession of non-owning railroads are to be returned to their owners. Before us is an action brought by fifteen steel producers and the American Iron and Steel Institute[1] seeking to enjoin, annul and set aside the order. We must determine whether the Commission's order is supported by "substantial evidence" and satisfies the statutory test of reasonableness. 49 U.S.C. § 1(14)(a).

[1] The American Association of Railroads, The National Industrial Traffic League and The National Association of Shippers Advisory Boards have been granted leave to intervene in this action.

The rules under review derive from a lengthy study begun in December, 1963, in which the Commission undertook to ascertain the adequacy *vel non* of the nation's supply of railroad freight cars. There followed on June 1, 1964, an announcement by the Commission's Division Three that there existed "a substantial inadequacy" of freight car ownership among America's railroads. 323 I.C.C. 48 (1964). At the same time, the Commission issued a formal notice of proposed rulemaking, pursuant to Section 1(14)(a) of the Interstate Commerce Act, 49 U.S.C. § 1(14)(a), broadening its inquiry to include all phases of car ownership, utilization, and distribution with a view toward alleviating the car shortage problem.

A seven-year study followed. Thirty verified statements were submitted by interested parties. In response to a verified statement by C. C. Robinson, of the Commission's Bureau of Enforcement, which advocated mandatory observance of car service rules promulgated by the railroad industry,[2] at least twenty corporations and shippers' associations, including the steel plaintiffs, obtained leave to intervene. They filed reply verified statements and were joined by twenty-five railroads, the American Short

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[2] A Code of Car Service Rules was established by the railroad industry more than half a century ago, when the free interchange of cars among rail lines became a widespread practice. In 1916, a Railroad Commission on Car Service was created to expedite observance of these rules by recalcitrant lines. Nonetheless, except for a brief period in 1917 and periodic emergency service orders since, compliance with the rules has remained voluntary. Even when the I.C.C. in 1947 ordered the railroads to file service rules with the Commission, no mandatory observance was required. Thus, the rules have served since their inception largely as guidelines to assist the carriers in their dealings *inter se*.

Line Railroad Association, The Association of American Railroads and many shipping interests. Over eighty-five reply verified statements were received.

A hearing before an examiner commenced on March 28, 1967, extended 50 days and produced almost 6,000 pages of testimony. The hearing examiner filed a 63-page report recommending discontinuance of the proceeding. He concluded:

> the record does not contain competent evidence upon which to base a conclusion as to the adequacy of freight car ownership; and that the adoption of the proposed car ownership formula, regulations, and car service rules has not been shown to be justified.

Eighteen months thereafter, in August, 1969, Division Three of the Commission reached a contrary conclusion, finding that the railroads lacked an adequate supply of freight cars, and ordering that car service rules 1 and 2 be mandatorily observed in order to increase car ownership by the railroads.[8] In

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[8] Rule 1:

Foreign cars, empty at a junction with the home road, must be:

a. loaded at that junction to or via home rails, or,
b. delivered empty at that junction to home road, except in instances where Rule 6 has been invoked, or unless otherwise agreed by roads involved.

Rule 2:

Foreign empty cars other than those covered in Rule 1 shall be:

a. loaded to or via owner's rails,
b. loaded to a destination closer to owner's rails than is the loading station or delivered empty to a short line or switch loading road for such loading (Car

February, 1970, the I.C.C. modified its order to permit certain exceptions to the Rules and to extend the effective date. In July, 1970, this court issued an order restraining enforcement of the order pending a determination in these proceedings.

At the threshhold we are met with certain settled principles of law. Because the decision of the Commission carries a presumption of validity, the plaintiffs have the burden of showing that it is invalid. *Waite* v. *United States*, 161 F.Supp. 856, 860 (W.D. Pa. 1958); *W. J. Dillner Transfer Co.* v. *I.C.C.*, 193 F.Supp. 823, 826 (W.D. Pa.), *aff'd.*, 368 U.S. 6 (1961); *W. J. Dillner Transfer Co.* v. *United States*, 214 F.Supp. 941, 944 (W.D. Pa. 1963). Moreover, in the limited scope of our judicial review of I.C.C. decisions, we defer to the expertise of the Commission and will disturb its orders only if there is no "warrant in the law and the facts for what the Commission has done." *Leonard Express, Inc.* v. *United States*, 298 F.Supp. 556, 559 (W.D. Pa. 1969). *Yourga Trucking, Inc.* v. *United States*, 308 F.Supp. 625, 626-627 (W.D. Pa. 1969). In addition, there exists a special statutory standard by which car service rules must be measured: "The Commission may, after hearing . . . establish reasonable rules,

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Selection Chart is designed to aid in so selecting cars for loading).

c. delivered empty to the home road at any junction subject to Rule 6.

d. delivered empty to the road from which originally received under load, at the junction where received, EXCEPT that when handled in road haul service, cars of direct connection ownership may not be delivered empty to a road which does not have a direct connection with the car owner.

e. returned empty to the delivering road when handled only in switching service.

regulations, and practices with respect to car service by common carriers by railroads subject to this chapter. . . ." 49 U.S.C. § 1(14)(a).

The Commission's report declares that the rules "are not designed to improve the utilization of freight cars, except insofar as return loading is compatible with the primary objective of increasing availability of cars to the owner." 335 I.C.C. at 294. From this flows the necessary conclusion that the "primary objective" of the rules was to increase the availability of freight cars to the car owning line.[4] Under the caption "Conclusions," the report states that

> there is a continuing freight car shortage which requires affirmative, remedial action at this time. We believe that this situation results from a combination of an inadequate ownership of general purpose type freight cars by respondents as a group and improper utilization of the available freight car fleet. . . . Therefore, we will attempt to supply the solution by requiring mandatory observance of the rules.

335 I.C.C. at 308.

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[4] The report continued:

> Thus, improved utilization will be largely in control of the owner who can then provide for the needs of his shippers for whom the equipment was acquired. The greater availability of owned cars rather than haphazard reliance on the supply of foreign cars will provide the owner with an opportunity to measure more accurately its ownership requirements. It will also permit the owner to maintain the car in a condition suitable for use when it is returned. Enforcement of the rules will shift the responsibility for shortages to the railroad with inadequate ownership and compel such a railroad to increase its fleet and to provide better maintenance for its cars.

335 I.C.C. at 294.

To find support for the Commission's action, we turn to what is described as the report's "Findings." We are puzzled that a seven-year study by that Commission, which included a 50-day hearing before an examiner with a record amounting to 6,000 pages, was climaxed by a spartan, one-sentence finding: "Upon further study, we find that respondents as a group [the American railroad industry] lack an adequate freight car supply and fail to furnish adequate freight car service." Paucity of words in an agency's finding does not, of course, render it defective. It does require a reviewing court, however, to subject the report to careful examination in order to decide whether the decision met the appropriate tests. Our examination becomes even more important where, as here, the Commission rejected the detailed report of its examiner with a minimum of explanation. We have previously said:

> The United States Court of Appeals for this circuit has pointed out that as a general rule a Commission's findings should be given much weight in cases in which they have specialized and intimate knowledge of the whole proceedings. However, they point out that a slightly different rule is applicable when a final determination by the Administrative Agency *rejects* the findings of a hearing examiner. It would appear that an examiner's report is not as unassailable as a master and can be reversed by the Commission. The reviewing court while it need not give a trial examiner's findings more weight than they deserve in the light of reason and judicial experience, they should be accorded the relevance that they reasonably command in answering the over-all question whether the evidence supporting the Commission's order is sub-

stantial. See In re United Corporation, 3 Cir., 249 F.2d 168.

W. J. Dillner Transfer Co. v. *I.C.C.*, *supra*, 193 F. Supp. at 827-28. Moreover, in the leading case of *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, 493, 496 (1951), setting forth the "substantial evidence" test, the Supreme Court stated:

> [T]he plain language of the statutes [Administrative Procedure Act] directs a reviewing court to determine the substantiality of evidence on the record including the examiner's report.
>
> . . .
>
> We do not require that the examiner's findings be given more weight than in reason and in the light of judicial experience they deserve. The "substantial evidence" standard is not modified in any way when the Board and its examiner disagree. We intend only to recognize that evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's. . . .

Although it found a freight car shortage that was "all pervasive" throughout the United States, ostensibly on both owner and non-owner lines, the Commission did not find that the shortage was more acute on the owner lines. Indeed, it is the very hypothesis of the I.C.C.'s conclusion that the shortage extends throughout the industry. The report contained numerous charts and tables relating to car shortages showing a decrease in serviceable cars, a decline of freight car ownership, the incidence of

cars off line, and an increase in turn around time (the time required for a consigned car to be unloaded and reshipped, loaded or unloaded). This may constitute substantial evidence of a general car shortage, but it does not support a specific finding of special car shortages on the owner lines. The requirement that an agency make appropriate findings is not imposed "to insist on formalities and to burden the administrative process with ritualistic requirements," *Yonkers* v. *United States*, 320 U.S. 685, 692 (1944); rather, it rests upon a recognition that

> [t]he courts cannot exercise their duty of review unless they are advised of the considerations underlying the action under review. . . . [T]he orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained.

SEC v. *Chenery Corp.*, 318 U.S. 80, 94 (1943).

Our concern with the absence of such a finding is similar to that expressed in *Palmer* v. *United States*, 75 F.Supp. 63 (D.D.C. 1947), in which the Court considered significant the absence of findings "that the public interest in the return of cars to the owning railroads outweighs the public interest in prompt movement of freight waiting shipment at the initial unloading point of the car. . . . There is no finding that the present need for cars is on the owning roads rather than on the hiring roads."

In any event, a requirement for the owner railroad "to increase its fleet" will, of necessity, produce substantial effects on the railroad industry and the shipping public. The record, however, is devoid of evidence which reflects the capacity of the railroad

industry to absorb new freight car capital expenditures.[6] The Bureau's main witness, Robinson, testified that he considered the economic impact to be irrelevant to the proceedings. Yet, in the same year that Division Three reversed the trial examiner, the I.C.C. in its Eighty-Third Annual Report, 1969, at 72, concluded that "the general financial condition of railroads may be expected to remain poor, capital expenditures to remain minimal, and reduction in employment extended."

Although we do not consider the financial capability of the railroads to be a controlling factor, we do deem it significant; the ultimate effect of the mandatory rules on both the railroad industry and the shipping public cannot be minimized. It is not beyond reason to contemplate that increased railroad capital expenditures would generate increases in shipping costs. Indeed, a witness for the American Association of Railroads testified that the "confusion, lost motion, delayed shipments, wasted car days, and extra car handling which would ensue, would far more than outweigh any benefits which might be achieved." It is elemental to require that a Commission report and order which may necessitate substantially inereased capital expenditures in the railroad industry be buttressed with evidence disclosing the financial status of the railroads which will be affected.

Absent isolated endorsements, the shipping public

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[6] The Bureau of Enforcement sponsored the mandatory regulation. By brief submitted in the proceedings before the Commission it declared: "It is likely that improvement of car service is going to cost the railroads substantially in investment and expense. The shippers should also be willing to accept the burden of expense which they would also incur."

was generally opposed to the mandatory rules.[6] The intervening National Association of Shippers Advisory Boards introduced evidence that the mandatory rules would: reduce operating efficiency; further burden the shipping public already suffering from shortages of rail equipment; unjustly penalize good faith shippers; work particular hardship on continuous process, fabricating and other industries which utilize inbound cars on outbound shipments; disrupt long-established business practices approved by the Commision built upon the sale of products while in transit; deny to the shipper the right to route his own freight; needlessly increase car handling; and add to transportation costs particularly switching and divert rail traffic to other modes of transportation.

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[6] Because the shippers and the railroads normally are adversaries in Commission proceedings, that they are virtually united in opposing the mandatory rules is a phenomenon not without significance. The concept of mandatory rules originated in and was advocated solely by the Commission's Bureau of Enforcement. It was not recommended by the shipping public or railroad industry as a solution to the complex problem of freight car shortage. Of 116 verified statements, support for the Bureau's recommendation came from an isolated sector of American industry, limited by product and geography:

> [Those supporting the rules] were witnesses Robinson and Ryder of the I.C.C.; Mr. Hilton of the American Plywood Company, I believe it is verified statement 27; Mr. Manning of Western Wood—the correct name of that is Western Wood Products Association, verified statement 28; and Mr. Hackenson and Mr. Singleton, representing the Public Utility Commissioner of Oregon, and that's verified statement 29 and reply verified statement 30, reply verified statement 84; and, finally, Mr. Heights of the United States Department of Agriculture, verified statement 23, reply verified statement 81.

Oral argument of I.C.C. General Counsel.

Witnesses for the National Industrial Traffic League, the largest diversified shippers' organization in the United States, testified that, far from advancing effective car utilization, mandatory enforcement would seriously obstruct and undermine railroad car utilization, and that the necessary consequence would be delay, wasteful railroad operations, and disruption of shippers' production and distribution programs.[7]

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[7] It is impossible to reconcile the divergent appraisal of this same data by the Commission and the examiner. The Commission observed:

> While observance of the rules may require some extra switching and short delays, this small inconvenience and perhaps additional expense is a small price to pay for the overall benefit to be derived when originating lines obtain quick return of their system cars which were acquired to satisfy the needs of local shippers.

335 I.C.C. at 295.

This is to be contrasted with the examiner's evaluation:

> If required by mandatory car service rules to predict routing and destination of individual shipments to be loaded on a specific day the steel companies would be faced with a requirement impossible to meet. In fact it would not be possible to improve the accuracy of forecasting without drastic changes in processing, storage and marketing practices.

Examiner's Report at 26.

> If the plant is among those where a large proportion of cars used for shipments have arrived under load, the necessary increase in switching would exceed the physical capabilities of the plant and the serving carriers beyond the point of rectification.
>
> . . .
>
> [T]he weight of the evidence, and arguments based thereon, compel the conclusion that mandatory rules would be of substantial detriment to rail carriers and shippers.

Id. at 27.

Finally, the Commission concedes that it will be unreasonable and, indeed, impossible, to expect total compliance with the rules. We are told by the examiner:

> If car service rules are established under authority of section 1 (14) (a) of the Interstate Commerce Act they become the rules of the carriers to the same extent as any rate, charge, or other rule which a regulated carrier is required to adopt against its will.
>
> The need for car service rules to be published in tariffs is said to be proven by the exhibits of record submitted by the Bureau of Operations to show bad practices. The witnesses supporting such publication knew that penalties apply when tariffs are not enforced but did not know the magnitude of such penalties. When it is noted that fines under the Elkins Act are not less than $1,000 and range to $20,000, this lack of knowledge indicates a reckless disregard of consequences. Such disdain is remarkable when it is noted that all of the Bureau witnesses agreed that perfect compliance with car service rules is impossible. One of the witnesses was of the opinion that compliance with the first four car service rules proposed would be good if it was made in 80 per cent of the instances those rules were applicable. In view of such opinion the witness believes that the proposed car service rules should be administered with "strictly controlled flexibility". The latter concept may beguile the imagination but it does not provide a comprehensible standard of enforcement. Imposition of the Elkins Act upon respondents for violation of the rules would not

> be a reasonable regulatory action when it is done with the knowledge that as many as 20 per cent non compliance with the rules constitutes good performance.

Examiner's Report at 24.

The admission that there cannot be complete observance of the mandatory rules is a factor which we may consider in determining the reasonableness of a regulation which is self-styled mandatory. The imposition of statutory penalties could be dependent upon a subjective determination of the field representatives of the Commission, thus depriving those charged with an ascertainable standard of guilt. This deprivation could possibly rise to constitutional proportions. See *United States* v. *Cohen Grocery Co.*, 255 U.S. 81, 89-91 (1921), although it is not necessary for us to reach the constitutional question. We consider the concerns about the "ascertainable standard of guilt" solely in the context of the reasonableness of the proposed regulation.

Respecting the expertise of the Commission, and cognizant of the sophisticated, myriad problems facing both the Commission and the railroad industry today, we conclude that the order does not meet the statutory test of reasonableness. Three major deficiencies inhere in the report: (1) a failure to find a specific freight car shortage in the owner-lines; (2) a failure to consider the financial effects upon the [non]owner-lines and the shipping public; and (3) a concession that there cannot be more than 80 per cent enforcement of regulations, the violation of which carries criminal penalties. We do not meet the question of a regulation supported by a record which does not contain a combintaion of these deficiencies.

Accordingly, we grant plaintiffs' motion to annul and set aside the report and order Ex Parte No. 241 of the Interstate Commerce Commission. An order making permanent the previous interlocutory injunction will issue forthwith.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 70-731

ALLEGHENY LUDLUM STEEL CORPORATION, ET AL.

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION

ORDER

For the reasons set forth in the foregoing opinion, it is ORDERED that the interlocutory injunction previously entered be and the same is made permanent and that the defendant Interstate Commerce Commission be and is hereby restrained and enjoined from enforcing or attempting to enforce that part of the orders of the Commission entered August 21, 1969, February 18, 1970, and March 18, 1970, which direct and require respondent railroads to comply, effective July 1, 1970, with Rules 1 and 2 of Appendix G to the report of the Commission, Division 3, dated August 21, 1969, 335 I.C.C. 264.

/s/ Russ Aldisert
United States Circuit Judge

/s/ Rabe F. Marsh
United States District Judge

/s/ John L. Miller
United States District Judge

DATED: March 18, 1971

APPENDIX C

EX PARTE NO. 241

INVESTIGATION OF ADEQUACY OF RAILROAD FREIGHT CAR OWNERSHIP, CAR UTILIZATION, DISTRIBUTION, RULES AND PRACTICES

Decided August 21, 1969

1. Upon further study respondents as a group found to lack an adequate freight car supply and fail to furnish adequate freight car service.
2. Certain car service rules prescribed and an ownership formula endorsed, both designed to alleviate a found freight car shortage.
3. Proceeding held open for such further action as may be warranted.

* * * *

REPORT OF THE COMMISSION

DIVISION 3, COMMISSIONERS TUGGLE, MURPHY, DEASON, AND HARDIN

MURPHY, *Commissioner*:

Exceptions to the examiner's recommended report and order were filed by the Commission's Bureau of Enforcement hereinafter called the Bureau, and two interveners. Replies were filed by a number of respondents[1] and other interveners. Our conclusions

[1] The respondents are the class I railroads, and a selected group of class II railroads and switching and terminal companies.

differ in part from those recommended. Exceptions and requested findings not specifically discussed in this report nor reflected in our findings or conclusions have been considered and found not justified.

In our prior report, 323 I.C.C. 48, decided June 18, 1964, we concluded that a substantial inadequacy of ownership in more than one category of freight cars existed throughout the United States among all respondents except those operating in the Pocahontas district. Subsequently, on July 29, 1964, we entered an order which broadened this proceeding for the stated purpose of obtaining detailed and precise information on all phases of freight car ownership, utilization, distribution, rules and practices which in any manner contribute to or affect the chronic freight car shortage problem, with the view to consideration of (1) the prescription of rules designed to alleviate the problem, and (2) the issuance of an order or direction under the provisions of section 1(13) of the Interstate Commerce Act.

A special procedure was adopted for the submission and receipt of evidence. As a preliminary, each respondent was ordered to file a verified return of a voluminous questionnaire which was distributed as an attachment to the order requiring its return. A pertinent portion of the questionnaire is reproduced in appendix A hereto. Based on some of the data submitted in response to the questionnaire, a verified statement concerning freight car ownership by respondents was prepared by the Commission's Bureau of Accounts and introduced in evidence by the Bureau; also introduced by the latter party were verified statements prepared by staff members of the Commission's Bureau of Railroad Safety and Service, now part of the Commission's Bureau of Operations. Included in these statements were two formulas de-

signed to determine the adequacy of the freight car fleet and rules and regulations designed to obtain maximum use of the available freight car fleet. At the same time 17 verified statements, one of which is a joint statement on behalf of two carriers, were filed by respondents. The reason why the other 207 respondents did not take advantage of the opportunity to file voluntary statements is not revealed of record or otherwise apparent. Only a few initial presentations were made by the shipping public; these consist of statements from a single shipper and five shipper associations. Additionally, statements were filed on behalf of the American Short Line Railroad Association, the Secretary of Agriculture of the United States and the Public Utility Commissioner of Oregon.

The special procedure rules did not permit cross-examination on the aforesaid verified statements prior to the filing of reply statements. The statements filed by the Bureau resulted in the filing of 47 rebuttal verified statements by respondents and 14 statements by the Asociation of American Railroads, hereinafter called AAR, on behalf of respondents. The opening statements also gave rise to the intervention of 13 additional shippers, seven shipper associations and five port authorities which filed verified statements in rebuttal. In addition, verified statements in rebuttal were filed by eight of the original interveners. These numerous statements, composed without the benefit of cross-examination, contain many duplicative arguments and factual accounts. In general the rebuttal statements present a solid opposition to the formulas, rules and regulations proposed in the opening verified statements.

A hearing was held for the purpose of cross-examination on the initial and rebuttal verified statements,

and briefs were filed thereafter by a number of the parties. Only the Bureau recomenmds adoption or prescription of an ownership formula, regulations and car service rules proposed herein by the Commission's Bureau of Operations.

The examiner in his recommended report found that the record does not contain competent evidence upon which to base a conclusion as to the adequacy of freight car ownership; that the adoption of the proposed car ownership formula, regulations and car service rules has not been shown to be justified; and he recommended discontinuance of the proceeding.

EXCEPTIONS

The Bureau excepts to almost every one of the findings and conclusions of the examiner. Intervener Vulcan Materials Company (Vulcan), excepts to the examiner's (1) failure to find a freight car shortage, (2) failure to find poor utilization of available equipment, and (3) to his recommendation that the proceeding be discontinued. In adition, Vulcan claims that the examiner failed to give any consideration to its proposed car service rules. In regard to the proposed rules, Vulcan abandoned a set of rules presented in its initial verified statement when it substituted a modified set of rules in its rebuttal statement. The latter were not proposed for adoption as written but merely for study. The primary thrust of these rules, as stated by Vulcan is "to make it the responsibility of the originating carrier to furnish a sufficient supply of freight cars for loading and give that carrier control over its cars." The examiner found that the rules proposed for study by Vulcan were self-serving without regard to the rights of other parties to receive notice, and rebut such proposals since they were contained in intervener's rebuttal

statement. Therefore, he held that an account of the Vulcan rules was not warranted as a mater of proper procedure or substance. We agree with the examiner in this respect and will give no further consideration to Vulcan's proposed rules.

The National Industrial Traffic League (League), intervener, also excepts to the examiner's failure to find that a national freight car shortage exists and his failure to adopt and implement four specific recommendations submited by it. The League further excepts to the examiner's refusal to reverse his ruling as to the admissibility of certain evidence introduced in the League's initial verified statement. The four recommendations made by the League are itemized in the examiner's report and those we find to be meritorious are discussed later herein, but all have been given consideration. As for the examiner's ruling as to admissibility of the contested evidence, we agree with the examiner that the statements stricken therein are inadmissible since they are in the nature of hearsay or conclusions based mainly on material that would not lend itself to cross-examination.

The General Motors Corporation, an intervener, filled only a reply to exceptions, but in its reply it renews a motion made during the hearing and renewed on brief to strike evidence submitted by the Bureau on behalf of the Bureau of Operations relative to demurrage charges. The motion was grounded on the argument that the notice of rulemaking issued by the Commission did not intend to reach rules and charges in published demurrage tariffs since no mention was made of the statutory provisions covering demurrage such as sections 6(1) and 15(1) of the act. We find no merit to intervener's renewed motion and affirm the examiner's ruling for the reasons provided in his recomended report. Demurrage charges are very

much a part of the rules and practices relating to the use and movement of railroad freight cars and such rules and practices are covered by our order broadening the subject investigation.

In its reply to exceptions, respondent Southern Railway System (Southern), filed a motion to strike portions of the exceptions filed by the League. The matter objected to involves a quoted portion of our prior interim report wherein general and specific reference was made to reported car shortages. Southern claims that since it had no opportunity to cross-examine the persons making these representations the evidence is hearsay and should not be used to establish the litigation facts in this proceeding. We do not agree that the material is hearsay evidence since it was either obtained from reports filed with the Commission or reflections of our experienced personnel. However, in recognition of the fact that respondents had no opportunity to rebut the findings or statements contained in our interim report, we will not use any of that material as a basis for any ultimate judgment herein.

In their reply to the exceptions, respondents Boston and Maine Corporation and the Trustees of the New York, New Haven and Hartford Railroad Company, acknowledge that they did not except to the examiner's recommended report and order. Nevertheless, they now indirectly attempt to object to certain statements and conclusions of the examiner. Since respondents failed to file any exceptions within the specified period, we will give no further consideration to those objections.

BACKGROUND

In docket No. 29669, *Car Service, Freight Cars*, 268 I.C.C. 687, (1947), the Commission conducted an

investigation for the purpose of determining, among other things, (1) whether the rules, regulations, and practices with respect to the use, control, supply, movement, distribution, exchange, interchange, and return of railroad freight carrying cars are unreasonable, or otherwise unlawful; whether freight cars are being wastefully, uneconomically, or inefficiently used, controlled, supplied, moved, exchanged, interchanged, and returned, and whether such cars are being unfairly or inequitably distributed among shippers, and (2) whether common carriers by railroad have been and are providing themselves with safe and adequate freight cars for performing, as common carriers, their car service. The Commission therein determined that the respondent railroads as a group had failed to furnish adequate car service, to the detriment of the shipping public. However, no rules were prescribed to remedy the inadequate car service since the Commission was led to believe that maximum efficiency in the utilization of freight cars would be accomplished through the wholehearted cooperation by all concerned, shippers and carriers, in the loading, movement and unloading of cars. Moreover, respondent railroads urged that the handling and distribution of freight cars be left to the system of private management which would be compatible with the principle of private operation of the railroad industry. The Commission did order, under the provisions of section 1(13) of the act, that each of the respondent rail carriers file with the Commission its rules and regulations with respect to car service.

The Commission also found an inadequacy in freight car ownership by rail carriers as a group. The Commission recognized, however, that this was caused in part by the inability of railroads to acquire new equipment in the years prior to 1947, because manu-

facturers of cars during World War II were otherwise engaged at the direction of the Federal Government, and, in part, by the postwar boom that resulted in a large increase in manufactured goods which required rail transportation. Therefore, the failure of the railroads to acquire additional cars or to replace worn out equipment was understandable.

It has been 22 years since the last proceeding and little, if any, improvement has been made in freight car service to the public; the railroads simply have not fulfilled the promises or assurances made to the Commission in that proceeding. Car shortages of varying duration and severity have occurred during this period and in nearly every national emergency. They have occurred in almost every year during peak periods of loading and in almost all producing areas of the country. Although freight car shortages may develop with adequate freight car ownership, it is impossible to prevent shortages if, in the first instance, the car ownership and loading capacity of the cars is inadequate. One of the purposes of this investigation is to determine whether the ownership of freight cars by respondents is sufficient to enable them to furnish adequate car service to meet normal as well as peak-loading period demands.

Table No. 1 below is a record of class I freight car ownership, aggregate carrying capacity, and average capacity per car owned for the 10-year period, 1955-1964. These figures were obtained from annual reports submitted by class I railroads to the Commission as required by the act. A decline not only in ownership, but also in aggregate carrying capacity of freight cars is illustrated in this table. A drop of 12.4 percent in total freight car ownership and 5 percent of aggregate carrying capacity is established in the last column, 1964 as compared to 1955.

TABLE NO. 1

Total class I railroad freight car ownership: Aggregate capacity of freight carrying cars (tons) and average capacity per freight car (tons) as of December 31st of each year for the 10-year period—1955-1964

	1955	1956	1957	1958	1959	1960	1961	1962	1963	1964	Net change 1964 compared with 1955	
											Cars—tons	Percent
Boxcars—general service:												
Owned	661,154	672,747	666,350	672,400	654,716	627,829	606,267	577,106	545,751	515,123	−146,071	−22.1
Aggregate capacity	32,069,390	32,686,781	32,554,063	32,827,113	32,281,700	31,516,371	30,151,570	28,884,466	27,256,506	26,011,443	−6,057,947	−18.9
Average capacity	48.5	48.7	49.0	49.1	49.3	49.4	49.8	50.0	49.9	50.5	+2.0	
Boxcars—special service:												
Owned	57,756	58,912	58,824	58,865	58,846	58,900	58,836	58,254	71,611	81,220	+23,464	+40.6
Aggregate capacity	2,756,567	2,810,660	2,815,660	2,870,337	2,900,931	2,950,971	2,950,257	2,909,921	3,627,749	4,532,804	+1,781,717	+64.6
Average capacity	47.8	48.6	48.8	48.9	49.3	49.5	49.8	51.3	50.8	55.8	+8.0	
Total boxcars:												
Owned	718,910	727,659	725,174	731,265	707,566	682,729	664,923	635,460	617,362	596,343	−122,567	−17.1
Aggregate capacity	34,825,977	35,496,241	35,369,723	35,697,349	35,182,631	34,176,342	33,102,207	32,044,419	31,084,257	30,544,247	−4,275,730	−12.3
Average capacity	48.4	48.7	49.0	49.1	49.3	49.5	49.8	50.1	51.2	51.8	+3.4	
Covered hopper cars:												
Owned	42,680	46,965	54,167	58,553	61,879	64,356	65,866	66,878	72,216	81,166	+38,486	+90.2
Aggregate capacity	2,920,566	3,232,512	3,766,367	4,061,023	4,257,693	4,450,432	4,607,496	4,690,907	5,277,842	6,016,776	+3,096,210	+106.0
Average capacity	68.4	68.8	69.4	69.3	68.8	69.2	69.9	70.6	73.1	74.1	+5.7	
Gondola cars (total):												
Owned	280,686	277,602	277,650	278,016	270,971	266,860	264,431	249,040	226,736	222,887	−57,699	−20.5
Aggregate capacity	16,656,706	16,740,545	16,825,436	16,969,617	16,686,856	16,444,557	15,906,782	15,580,157	14,790,122	14,078,446	−2,752,260	−16.4
Average capacity	60.0	60.3	60.6	61.1	61.6	61.8	62.0	62.5	62.5	63.2	+3.2	
Hopper cars (open-top):												
Owned	506,449	508,242	521,276	512,466	486,686	480,445	469,149	449,385	431,713	431,791	−74,658	−14.7
Aggregate capacity	30,686,268	30,804,701	30,686,977	30,567,025	29,907,366	29,104,512	28,074,516	26,990,961	25,754,518	27,719,390	−1,966,878	−6.5
Average capacity	60.4	60.6	60.5	60.6	60.0	60.0	60.7	61.5	62.0	64.2	+3.8	
Stock cars:												
Owned	37,923	36,650	35,717	35,727	31,761	30,606	29,627	26,667	24,647	22,446	−15,477	−40.8
Aggregate capacity	1,806,276	1,761,623	1,717,696	1,652,686	1,561,000	1,512,691	1,456,784	1,346,176	1,216,536	990,471	−815,805	−45.2
Average capacity	30.7	30.7	30.7	30.8	30.4	30.4	30.3	30.4	30.6	30.7		
Flat cars:												
Owned	56,174	56,662	54,925	52,666	52,716	52,716	51,881	49,978	49,565	48,257	−7,917	−14.0
Aggregate capacity	3,063,520	3,094,418	3,007,267	2,944,966	2,872,740	2,872,740	2,823,881	2,762,813	2,727,649	2,650,666	−363,851	−11.7
Average capacity	55.5	55.4	55.8	54.9	54.5	55.4	55.6	55.7	55.0	54.5	+1.4	
Refrigerator cars:												
Owned	19,849	20,010	20,210	20,061	20,541	26,007	28,084	29,457	33,365	36,923	+17,074	+86.0
Aggregate capacity	740,000	761,165	787,544	787,567	872,477	1,210,666	1,324,879	1,482,347	1,748,143	2,004,366	+1,264,320	+164.0
Average capacity	38.7	38.0	38.9	39.7	42.5	47.4	47.4	50.3	52.5	54.1	+15.4	
Other freight cars:												
Owned	36,575	36,156	42,644	43,461	44,435	46,672	45,451	46,776	45,861	45,962	+13,167	+35.8
Aggregate capacity	1,810,566	1,807,400	2,106,647	2,206,747	2,281,648	2,424,992	2,276,119	2,455,916	2,496,827	2,727,946	+921,494	+50.8
Average capacity	49.5	50.7	51.6	52.3	52.5	52.8	52.8	52.5	54.5	54.4	+4.9	
Total freight cars:												
Owned	1,666,414	1,706,643	1,748,721	1,724,226	1,679,346	1,668,282	1,604,241	1,550,667	1,512,506	1,468,668	−210,626	−12.4
Aggregate capacity	91,226,266	92,161,028	93,063,669	94,466,434	93,264,609	91,847,166	89,282,926	87,223,696	86,942,901	86,671,766	−4,557,661	−5.0
Average capacity	53.7	54.0	54.5	54.8	55.0	55.4	55.7	56.3	56.5	59.2	+4.5	

Source: Class I railways, annual reports (1955-1964) to Commerce.

In 1955, class I railroads reported to the Commission revenue from freight totaling $8,538,286,192 and in 1964, they reported $8,455,457,209, representing a loss of approximately 1 percent of the 1955 total. Revenue tons originated in 1955 totaled 1,396,000,000 and in 1964, 1,356,000,000, representing a loss of 2.9 percent in tons originated. A decline of 1 percent in earnings and 2.9 percent in tons originated should not result in losses of 12.4 percent in the ownership of freight cars in the national fleet, and 5 percent in the carrying capacity of that fleet as shown in table No. 1.

The greatest decline in any classification of freight carrying cars, both in ownership and aggregate capacity, has been in the plain boxcar classification. Table No. 1 reflects a loss of 22.1 percent in ownership and 18.9 percent in the aggregate capacity in this classification of cars, 1964 as compared to 1955.

Equipped boxcar ownership, although increasing less consistently than the decrease in plain boxcar ownership, has radically increased during the last 3 years in the study period. Thus, the figures in table No. 1 relating to boxcar ownership by car classifications for the years 1955-1964 reflects a change in the type of new equipment purchased by the carriers with an emphasis in more recent years on the purchase of less plain boxcars and more equipped boxcars. Despite the increase in equipped boxcar ownership, a net loss of 17.1 percent in total boxcar ownership and 12.3 percent in the aggregate carrying capacity of total boxcars is reflected in table No. 1.

Open-top hopper car ownership declined 14.7 percent and there was a decline in aggregate capacity of 6.2 percent during the studied period as shown in the last column of table No. 1. The decline in aggregate carrying capacity was offset to some extent by the installation of larger capacity cars during the last 3

of the 10 years studied. Covered hopper car ownership nearly doubled, an increase of 90.5 percent, during the period and the average carrying capacity more than doubled, an increase of 106 percent 1964 over 1955. This classification of equipment, however, is specialized and while it is used quite often in the movement of grain, its substitution for the plain boxcar function in the national fleet is limited.

Gondola car ownership declined by 57,639 cars and 2,752,259 tons of aggregate carrying capacity during the 10-year period, 1964 as compared with 1955. These figures represent a decrease of 20.5 percent in cars and 16.4 percent in tons of aggregate capacity, 1964 compared with the 1955 reported car ownership and capacity.

In order to make any determination as to the adequacy of freight car ownership, it is necessary to have records of serviceable cars, turn-around time, car shortages as reported and car loadings by type of cars loaded. Since this information is furnished for class I railroads only, it was necessary to confine this study to class I railroads. In the Commission's "Form A", annual reports, carriers are required to state ownership and unserviceable cars as of the first and last day of the year only; installation and retirement data are reported annually. Information as to car shortages, car loadings by type of equipment, or turnaround time is not required in "Form A," but this data is gathered by the AAR from weekly and monthly reports submitted by class I carriers (CS-44 reports). Consequently, there is some variation in ownership data due to the fact that carriers file "Form A" reports on December 31 and file reports to the AAR on January 1.

Table No. 2 below, showing freight car ownership, unserviceable freight cars and serviceable freight cars

for the 10-year period, 1956-1965, is compiled from reports made weekly and monthly by class I railroads to the AAR. As shown in the table, class I railroads lost 224,137 cars, or 12.6 percent of their total freight car ownership, 1965 compared to 1956. Their ownership of serviceable cars declined 238,622, or 14 percent of the entire serviceable ownership. Since serviceable cars are the only cars that can be used in transportation, the loss of 14 percent in these cars is of greater concern than the loss in ownership. Total plain boxcars owned by class I railroads decreased 23.4 percent and serviceable plain boxcars decreased 26.1 percent, 1965 compared to 1956. Gondola car ownership decreased 20.2 percent and serviceable gondolas declined 22.5 percent, a loss of 2.3 percent greater in serviceable cars than in ownership. Open-top hopper cars declined 14.1 percent of all such cars owned and 15 percent of serviceable cars during the same period.

On January 1, 1965, class I railroads owned a total of 1,550,477 freight cars. This is 12.6 percent less than the number of cars owned on January 1, 1956. On January 1, 1965, there were 88,856 unserviceable cars which could not be utilized for loading until they were repaired or rebuilt. The remaining 1,461,621 serviceable cars which were ready for use were 14 percent, or 238,622 cars less than the number reported serviceable on January 1, 1956.

TABLE NO. 2

Total class I railroad freight car ownership, unserviceable cars, and serviceable cars, as reported by class I railroads[1] to the Association of American Railroads on January 1, of each year; 10 years 1956-1965, by type of car

	1956	1957	1958	1959	1960	1961	1962	1963	1964	1965	Net change 1965 compared with 1956	
											Cars	Percent
Boxcars—general service:												
Owned	864,345	874,004	865,276	874,795	865,415	839,200	809,457	778,524	743,696	708,713	-155,632	-18.4
Unserviceable	22,443	25,906	32,216	47,506	47,143	53,853	49,800	48,365	38,625	34,051		
Serviceable	641,906	648,096	653,060	626,944	606,275	585,365	559,568	532,489	506,273	474,622	-167,284	-26.1
Boxcars—special service:												
Owned	52,497	51,473	51,166	47,940	50,220	53,265	54,275	56,941	75,869	87,869	+35,392	+67.4
Unserviceable	2,976	2,522	2,515	2,913	2,920	4,169	3,815	3,430	3,012	2,621		
Serviceable	49,521	48,951	48,651	45,027	47,300	49,196	50,460	53,491	68,877	85,248	+35,747	+72.2
Total boxcars:												
Owned	716,845	725,477	736,442	722,732	706,736	692,364	663,732	637,778	615,567	596,602	-120,243	-16.8
Unserviceable	25,419	28,430	34,731	50,721	50,063	58,004	53,714	49,515	41,637	36,702		
Serviceable	691,426	697,047	701,711	672,011	656,665	634,361	610,045	587,980	574,250	559,900	-131,526	-18.0
Covered hopper cars:												
Owned	41,756	46,210	54,115	56,363	61,607	63,810	65,686	69,108	72,823	81,753	+39,997	+95.8
Unserviceable	556	601	1,055	1,219	1,426	1,576	1,816	1,841	1,523	1,665		
Serviceable	41,199	45,609	53,060	57,144	59,979	62,233	63,870	67,265	72,301	79,768	+38,569	+93.7
Gondola cars (total):												
Owned	288,306	277,430	276,007	275,834	271,826	266,534	256,749	248,625	237,127	223,681	-64,625	-36.2
Unserviceable	16,695	12,993	19,456	32,467	35,799	34,701	33,666	33,026	26,463	17,551		
Serviceable	268,611	264,537	256,519	246,367	243,827	231,833	223,083	215,602	210,664	206,130	-62,481	-23.3
Hopper cars (open-top):												
Owned	505,336	507,819	525,082	516,115	490,820	464,044	465,342	443,764	434,316	434,234	-71,102	-14.1
Unserviceable	29,276	19,150	27,420	54,496	36,664	53,053	42,665	31,927	26,227	26,131		
Serviceable	480,060	488,669	497,672	461,621	454,156	430,991	422,677	411,837	408,089	408,103	-71,957	-15.0
Stock cars:												
Owned	37,693	36,521	35,378	33,609	31,670	30,478	29,148	26,190	24,376	22,125	-15,568	-41.3
Unserviceable	1,755	2,163	1,786	2,051	1,904	1,851	1,532	1,324	1,607	975		
Serviceable	35,738	34,728	33,622	31,558	29,766	28,627	27,616	24,866	22,769	21,150	-14,588	-40.8
Flat cars:												
Owned	48,376	48,924	50,188	49,557	51,267	53,100	54,111	54,125	56,316	65,772	+10,396	+21.5
Unserviceable	1,710	1,845	2,044	2,397	2,436	3,231	3,562	2,620	2,069	2,664		
Serviceable	46,666	46,079	46,074	47,160	48,831	49,869	50,549	51,505	53,847	63,108	+16,442	+26.2
Refrigerator cars:[1]												
Owned	100,661	96,401	95,065	93,129	91,812	91,301	89,453	86,264	90,964	93,408	-6,453	-6.7
Unserviceable	3,017	4,933	6,751	6,748	3,995	4,778	5,114	4,021	3,816	1,263		
Serviceable	96,144	93,466	91,314	87,381	87,814	86,522	84,339	82,243	87,052	91,840	-4,304	-4.4
Other freight cars:												
Owned	44,439	46,794	47,402	46,581	46,274	46,066	44,265	42,452	40,977	39,904	-4,535	-10.2
Unserviceable	1,238	1,354	976	1,115	1,623	1,263	1,720	1,656	1,530	1,405		
Serviceable	43,200	45,440	46,426	45,476	44,651	44,761	42,536	40,784	39,547	38,499	-4,701	-10.9
Total freight cars:[1]												
Owned	1,776,614	1,766,378	1,824,963	1,800,770	1,749,104	1,727,996	1,665,948	1,611,344	1,572,990	1,550,477	-226,137	-12.6
Unserviceable	74,371	71,369	96,223	151,612	126,125	156,610	143,795	127,072	105,471	89,556		
Serviceable	1,700,243	1,715,027	1,730,360	1,649,158	1,624,979	1,569,386	1,524,153	1,484,272	1,467,519	1,461,021	-235,622	-14.0

[1] Includes railroad owned and railroad controlled refrigerator car lines.

Source: Monthly reports of Association of American Railroads, Car Service Division.

Installation and retirements of freight cars by class I railroads during a 1955-1964 study period are shown in table No. 3. Reflected therein is a continuing trend of high retirements in plain boxcars accompanied by a corresponding trend of high installation in equipped boxcars. As noted in column 3 of table No. 3, equipped boxcar installations increased in 1964, in excess of 15,900 cars (including negative retirements) which is greater than the total of all equipped boxcar installations in any of the prior 9 years. Beginning in the year 1962, and continuing through 1964, a high negative retirement figure of equipped boxcars is reported. Negative retirements result from cars purchased secondhand, returned from lessor or cars reclassified. The greater part of these negative retirements are plain boxcars which were reclassified into equipped boxcars by the mere installation of some minor load restraining device.

It is of great significance that total freight car retirements have exceeded total freight car installations during the 10-year period studied. The number of plain boxcars and gondola car retirements was over twice as many as the number of cars installed in each of these classifications throughout this period, 1955-1964.

In only 2 years of the 10-year period did total installations of plain boxcars and gondolas either equal or exceed total retirements. Furthermore, the number of cars retired during the 10 years totals nearly 50 percent of January 1, 1965, total freight car ownership. The total number of plain boxcars, the work horse of the freight car fleet, retired during the 1955-1964 period reflects about 59 percent of the January 1, 1965 ownership; total installations were about 28 percent.

TABLE NO. 3

New freight cars installed and freight cars retired[1]—10 years 1955-1964, class I railroads

	Plain boxcars	Equipped boxcars	Total boxcars	Covered hopper cars	Gondola cars	Hopper cars	Stock cars	Flatcars	Refrigerator cars	Other cars	Total cars
Ownership January 1, 1955	666,238	50,775	717,013	37,656	294,202	537,154	39,058	47,814	99,945	43,575	1,816,752
1955 Installed 1955	20,282	900	21,182	3,447	2,624	3,906	100	1,662	2,946	1,642	37,509
Retired 1955	22,106	2-822	21,284	2-631	15,713	30,611	1,665	1,094	2,533	892	73,491
1956 Installed 1956	25,996	1,705	30,704	4,750	4,967	14,122	300	2,793	2,239	1,740	61,615
Retired 1956	19,340	2,732	22,072	296	7,843	11,841	1,272	1,245	3,899	1,385	49,553
1957 Installed 1957	31,412	1,773	33,185	7,927	10,441	31,272	0	1,052	4,723	3,960	92,590
Retired 1957	20,140	2,080	22,220	22	9,564	13,789	1,142	906	5,089	1,352	54,363
1958 Installed 1958	5,282	493	5,775	4,163	11,215	12,920	200	786	2,194	916	41,172
Retired 1958	15,766	3,719	22,485	2-105	10,371	21,895	2,170	1,329	5,130	1,727	65,006
1959 Installed 1959	13,515	1,593	15,405	3,223	5,710	12,725	0	2,355	2,213	390	42,024
Retired 1959	32,559	2-457	32,402	199	12,935	35,520	1,939	655	6,030	707	93,690
1960 Installed 1960	11,490	2,452	13,942	2,426	7,111	15,552	0	2,739	4,034	123	49,227
Retired 1960	27,705	2-593	27,115	2-77	12,203	21,525	992	596	4,045	333	70,335
1961 Installed 1961	6,571	849	7,720	1,990	2,397	9,441	0	1,621	3,069	170	26,408
Retired 1961	36,554	2-61	[illegible]523	212	12,182	25,143	1,330	610	4,557	1,969	85,856
1962 Installed 1962	6,544	2,901	[illegible]745	3,828	738	9,948	100	1,616	4,016	241	30,232
Retired 1962	37,497	2-1,765	[illegible]732	410	7,569	31,506	3,058	1,602	5,235	2,024	87,436
1963 Installed 1963	6,503	6,039	12,542	4,527	210	5,646	0	3,623	6,257	363	36,468
Retired 1963	41,439	2-7,009	34,430	110	12,701	17,914	1,814	1,432	3,653	2,765	74,822
1964 Installed 1964	5,206	9,810	15,016	8,295	2,010	25,764	302	3,429	6,332	565	68,043
Retired 1964	43,391	2-6,090	37,301	365	15,456	29,046	2,550	973	3,797	1,035	90,556
Installed—10 years 1955-1964	142,401	28,515	171,219	44,576	47,456	150,596	1,002	21,706	35,023	10,410	485,298
Retired—10 years 1955-1964	299,560	2-8,296	291,564	801	117,170	245,435	17,932	10,742	44,565	14,195	745,407
Ownership January 1, 1965	505,713	87,859	596,602	81,753	223,651	434,234	22,128	55,772	93,403	39,904	1,550,477
Net gain or loss in ownership:											
January 1, 1965 versus January 1, 1955	-157,525	+37,114	-120,411	+44,065	-70,521	-102,920	-16,930	-10,955	-6,545	-3,971	-266,275
Percent—gain or loss	-23.6	+73.1	-16.5	+116.9	-24.0	-19.2	-43.3	+22.9	-6.5	-9.1	-14.7

[1]Includes railroad owned and railroad controlled refrigerator car lines.

[2]Negative retirement indicates increase in ownership in excess of new installations, resulting from reclassifications or transfer of equipment, purchase or lease of used equipment, et cetera.

Source: Reports of Association of American Railroads, Car Service Division.

Table No. 4 is a statement of average daily freight car shortages as reported by class I railroads to the AAR throughout the study period, 1955-1964 and averaged yearly for the 10 years. Table No. 5 for the same period represents average daily boxcar shortages by months, by type of boxcar, plain and equipped, and the total of both types. Monthly averages were obtained from weekly reports of average daily shortages as published by the AAR.

In the first 7 years of this 10-year period, shortages of plain boxcars were substantial during the peak shipping months of August, September, and October. This trend is no longer confined to the peak shipping months, but extends throughout the entire year as demonstrated in table No. 5 for the years 1962, 1963, and 1964. A daily average shortage of 100 or more equipped boxcars was reported only five times during the 10 years studied, which would indicate an ownership in that category adequate to meet demands.

TABLE No. 4

Average daily freight car shortages-10 years-1955-1964—Class I Railroads

	Plain boxcars	Equipped boxcars	Total boxcars	Gondola cars	Hopper cars	Covered hopper cars	Flat cars	Refrigerator cars	Total all freight cars
Daily average									
1955									
Fifty-two weeks--	5,252	40	5,293	857	2,201	85	97	5	8,631
Highest week----	12,491	162	12,507	3,360	6,713	268	471	117	22,659
Lowest week----	84	0	84	0	0	0	0	0	84
1956									
Fifty-two weeks--	3,088	13	3,101	1,366	1,953	124	85	10	6,754
Highest week----	7,598	72	7,612	4,422	5,481	324	317	163	18,951
Lowest week----	594	3	601	138	54	0	0	0	1,105
1957									
Fifty-two weeks--	491	5	496	370	520	12	44	0	1,477
Highest week----	1,628	27	1,631	936	2,379	163	149	20	3,273
Lowest week----	0	0	0	0	0	0	0	0	12
1955									
Fifty-two weeks--	976	2	978	14	186	11	1	13	1,235
Highest week----	6,297	50	6,297	173	1,029	129	20	335	7,495
Lowest week----	0	0	0	0	0	0	0	0	5
1959									
Fifty-two weeks--	1,063	2	1,065	158	265	125	67	1	1,726
Highest week----	4,067	20	4,067	578	1,940	420	388	21	5,205
Lowest week----	76	0	145	0	0	0	0	0	145
1960									
Fifty-two weeks--	1,400	1	1,401	38	115	42	18	5	1,637
Highest week----	6,071	15	6,071	162	632	189	103	121	6,617
Lowest week----	111	0	128	0	0	0	0	0	128
196 P									
Fifty-two weeks--	1,136	16	1,152	21	137	61	12	2	1,390
Highest week----	3,887	125	3,963	177	988	195	70	35	5,206
Lowest week----	120	0	120	0	0	0	0	0	120

See note at end of table.

TABLE No. 4

Average daily freight car shortages-10 years-1955-1964—Class I Railro[redacted]tinued

	Plain boxcars	Equipped boxcars	Total boxcars	Gondola cars	Hopper cars	Covered hopper cars	Flat cars	Refrigerator cars	Total all freight cars
Daily average									
1962									
Fifty-two weeks	2,926	18	2,944	58	225	124	80	7	3,451
Highest week	9,240	93	9,271	272	1,120	576	288	50	9,949
Lowest week	285	0	310	0	0	0	0	0	314
1963									
Fifty-two weeks	5,383	18	5,401	223	1,252	255	163	15	7,329
Highest week	14,829	61	14,863	850	3,928	974	638	137	19,178
Lowest week	220	0	220	0	0	0	0	0	225
1964									
Fifty-two weeks	2,822	78	2,900	568	687	203	245	12	4,669
Highest week	8,480	290	8,759	1,158	2,552	612	694	79	12,673
Lowest week	579	11	688	27	0	6	2	0	1,280
Ten years	2,454	19	2,473	367	754	104	81	7	3,830

Source: Weekly reports by class I carriers to Association of American Railroads.

Average daily boxcar shortage: By months, ten years—1955-1964

Class I Railroads

	1955	1956	1957	1958	1959	1960	1961	1962	1963	1964
Plain boxcars										
January	365	1,540	545	18	207	404	277	1,447	710	2,916
February	547	2,318	1,255	4	620	716	542	4,531	6,730	4,434
March	1,207	3,815	1,116	31	632	917	439	1,927	10,085	1,812
April	1,768	3,781	320	8	704	1,173	491	1,499	6,669	1,149
May	3,852	3,550	129	6	1,259	[illegible]	[illegible]	1,338	3,832	919
June	6,110	2,651	112	399	1,72[illegible]	1,129	583	1,061	1,960	1,683
July	10,813	2,921	670	490	1,23[illegible]	1,621	1,4[illegible]8	1,419	2,095	1,052
August	7,984	2,591	652	1,440	[illegible]	1,425	1,[illegible]	2,328	2,030	1,002
September	7,334	4,354	421	2,130	1,403	1,172	1,462	4,131	2,564	2,825
October	11,598	6,074	515	5,217	2,[illegible]36	4,518	3,568	7,885	12,459	7,234
November	8,599	2,348	115	1,839	[illegible]	2,491	[illegible],916	7,251	11,823	5,805
December	1,424	1,019	10	348	[illegible]	172	1,[illegible]48	1,300	2,892	1,945
Equipped boxcars										
January	24	10	2	0	[illegible]	0	0	0	0	30
February	106	16	3	0	[illegible]	1	0	36	14	51
March	127	29	2	0	[illegible]	[illegible]	0	0	30	54
April	66	15	0	0	3	5	0	0	15	22
May	14	7	5	0	3	0	4	0	0	26
June	21	7	6	0	0	0	0	0	6	29
July	3	17	10	0	0	[illegible]	14	0	12	16
August	16	14	1	1	0	0	0	0	32	31
September	20	12	2	0	[illegible]	[illegible]	68	28	20	124
October	17	12	0	0	0	[illegible]	87	55	45	263
November	53	7	12	12	[illegible]	[illegible]	15	24	22	194
December	18	8	13	17	[illegible]	[illegible]	0	15	18	79
Total boxcars										
January	392	1,550	547	18	[illegible]	[illegible]	277	1,447	710	2,946
February	653	2,334	1,258	4	[illegible]	7[illegible]9	542	4,567	6,744	4,485
March	1,334	3,844	1,118	31	637	923	439	1,927	10,115	1,866

See note at end of table.

TABLE No. 5

Average daily boxcar shortage: By months, ten years–1955-1964–Continued

Class I Railroads

	1955	1956	1957	1958	1959	1960	1961	1962	1963	1964
Total boxcars										
April	1,834	3,796	326	8	707	1,178	491	1,499	6,684	1,171
May	3,866	3,557	134	6	1,262	711	613	1,338	3,832	945
June	6,131	2,658	118	399	1,721	1,129	583	1,061	1,966	1,712
July	10,816	2,938	680	490	1,235	1,621	1,502	1,419	2,107	1,068
August	8,000	2,905	683	1,441	841	1,425	1,389	2,328	2,062	1,033
September	7,354	4,366	423	2,130	1,403	1,172	1,530	4,159	2,584	2,952
October	11,615	6,086	518	5,217	2,436	4,518	3,655	7,940	12,504	7,497
November	8,952	2,355	127	1,851	1,470	2,491	1,934	7,275	11,845	5,999
December	1,442	1,027	23	365	410	172	1,243	1,315	2,910	2,024

Source: Weekly reports by class I carriers to Association of American Railroads.

Table No. 6 is a statement of the national turnaround time for class I railroads on all freight cars, by type, for the 10-year period, 1955-1964. Turnaround time is the elapsed time between loadings. These statistics are published by the AAR monthly, with the yearly average published annually, and this is the only available published record which reflects the utilization of freight cars. The method used to determine turnaround time is as follows: The average number of serviceable cars on line, including private cars, multiplied by the number of days in the period produces car-days. Car-days divided by loading produces turn-around time.

For all types of boxcars, turnaround time increased from 15.78 days in 1955 to 20.08 days in 1964. Paralleling the rise in turnaround time has been the increased number of equipped boxcars placed in assigned service during the 10-year period as shown in table No. 1. The trend of placing more boxcars in assigned service has directly prevented the full utilization of this equipment because the assigned car is generally returned empty to the point of origin; this is one of the factors of assigned service and this increases the national turnaround time.

The turnaround time on covered hoppers increased from 15.7 to 20.75 days, an increase of over 5 days per turn, during the same 10 years. This increase per turn of covered hopper cars reflects the results of placing large numbers of these cars in assigned service.

Turnaround time on gondola cars fluctuates with gondola car requirements. In 1958, gondola car loadings dropped sharply and turnaround time increased correspondingly from 17.18 days in 1957 to 23 days in 1958. Turnaround time on open-top hopper cars remained comparatively static depending on increases

in demand. The close interrelationship between turnaround time on both gondola and open-top hopper cars to the demand for these types of equipment appears consistently throughout the entire 10-year period.

However, turnaround time on flatcars was reduced almost 48 percent during the study period. Tariff requirements placing time restrictions on certain flatcar traffic, using piggyback, trilevel and bilevel automobile flats, accounts for the improvement.

TABLE No. 6

Turnaround time—in days—10 years—1955-1964

Class I Railroads

52 weeks	All box	Covered hoppers	Gondolas	Hoppers	Stock	Flat	Refrigerator	Total all cars
1955	15.78	15.70	16.72	14.15	30.07	22.89	26.54	16.24
1956	16.19	16.63	16.07	14.09	29.12	22.22	28.08	16.37
1957	17.64	18.47	17.18	14.62	36.29	21.27	29.92	17.43
1958	18.95	21.00	23.00	18.50	39.03	22.37	30.79	20.17
1959	16.12	19.53	20.89	17.15	37.03	18.07	30.68	19.00
1960	19.18	20.94	20.99	16.41	40.54	15.59	31.51	19.16
1961	19.76	21.85	22.47	17.13	46.00	15.06	32.33	19.85
1962	19.41	21.46	22.24	16.41	46.34	13.64	30.81	19.24
1963	19.37	20.92	20.46	15.24	52.94	12.87	32.96	18.74
1964	20.08	20.75	19.07	14.48	50.21	11.97	34.39	18.42

Source: Annual reports compiled by Association of American Railroads.

The above statistics gathered from the 10-year study period, and furnished by respondents themselves in their annual reports to the Commission or in CS-44 reports made to the AAR, demonstrate that the class I railroads have failed to maintain an adequate freight car supply sufficient to serve the Nation's shippers. Respondents argue that the decrease in the number of cars, especially plain boxcars, is meaningless because if the railroads can manage to perform their necessary role with a smaller fleet, it would be a mark of economy and efficiency. They contend that advanced types of equipment such as larger and heavier loading boxcars, flatcars for piggyback traffic, rack cars for motor vehicle loadings, covered hoppers for grains and flatcars for the transport of packaged lumber have all but replaced the outmoded and obsolete traditional type of boxcar. We commend the railroad industry for these new innovations in rolling stock and endorse their forward thinking improvements; but statistics show that in spite of these new and improved cars, aggregate carrying capacity declined 5 percent during the 10-year period, 1955-1964, while revenue tons originated declined only 2.9 percent.

Further support for a finding that the available freight car fleet is inadequate is provided for in the data reported for October 1964, in compliance with our order in this proceeding. These reports produced an average daily plain boxcar shortage of 8,251 cars or 17.76 percent of demand, which included average daily shortages reported by short-line and switching and terminal companies in the amount of 162 cars. For all freight cars, the shortages are somewhat less. Application of a formula, designed by the Bureau of Accounts, to the reported data of October 1964,

shows a deficiency of 111,042 cars or 7.66 percent of the total railroads' ownership.

Although the reported shortages for types of cars other than plain boxcars are relatively not as drastic, except perhaps for covered hoppers and flatcars, this fact would not warrant exclusion of any class of cars in any program designed to improve car supply. Testimony and verified statements of numerous witnesses show that there are significant shortages of various other types of cars. The lumber industry experiences shortages of flat-cars as well as boxcars. The steel industry experiences a shortage of 65-foot gondolas and of other types most of the time. Delays of 7 to 10 days on orders for 65-foot gondolas are experienced without shippers being able to meet a single 24-hour production requirement. There was a nationwide shortage of TOFC flatcars in the first quarter of 1966. The grocery industry is faced with a chronic shortage of suitable boxcars. There have been shortages in wheat producing areas and the AAR had to issue a distribution order in the first quarter of 1967 for the return of cars to two of the granger roads. The plywood industry had just enough cars to meet requirements in 1967 after production declined 14 percent under 1966. Witnesses for the coal interests testified that there were severe shortages of open-top hoppers from April to October 1964. In the spring, there are shortages of such types for the movement of aggregates. A witness for the coal industry testified that there had been a shortage of coal cars in 1967 and that during the year mine operators often had to shut down and send their miners home because there were no cars available for loading.

From the evidence adduced and the data collected, it is obvious that an adequate freight car supply is

as much a problem today as it was during the period considered in our last proceeding in 1947. Car service which involves a shortage of approximately 1 out of every 10 cars ordered or even 1 out of every 15 cars ordered demands that every available means be marshalled to eliminate such deficiencies.

Freight Car Utilization

Many of the parties concede that there is a shortage of equipment, but assert that this shortage results from improper utilization or misuse of the available freight car fleet, rather than from inadequate ownership. Indicative of poor utilization of cars is the percentage of ownership of cars on line or the availability of their own car fleets to individual railroads. In its report in *Car Service, Freight Cars, supra,* the Commission took note of the then existing dislocation of boxcars, pointing out that on March 1, 1947, there were but 16.4 percent of boxcars owned located on owners' rails. Since that time the poor percentage of boxcars on line has not been that extreme, but the low levels have been significant. From the spring of 1947 until the end of February 1950, the percentage of cars owned that were on owners' lines increased from 16.3 to 38.5 percent when a serious decline set in. In 1951, the percentage of all boxcars on line reached a low level of 18.8 percent, but thereafter it began to increase again until 1954 when a high of 45.2 percent was reached. Commencing in February 1955, there was again a sustained period of dislocation extending through 1956 when the percentage dipped to 25.6. From 1957 on into October 1964, there was a period of relative stability in the percentage of owned boxcars located on owners' lines differing, however, from other periods of stability in that dislocation grew in intensity

and duration each year during the fall season, and that each year there was slightly less recovery than in the preceding year. In 1965, the maximum percentage of owned plain boxcars on owners' lines reached a high of 36.9 on only two occasions, but remained in the low 30-percent range virtually all of the first 10 months of the year. At year's end the percentage of plain boxcars on line was 29.9, the lowest such level in 9 years; on March 1, 1966, the percentage of plain boxcars on line dipped to 27.7 percent. The above statistics include bad order cars as well as serviceable cars which would even further reduce the availability to owners of cars to load.

The effect of the low percentage of ownership on line is to deprive the originating line of the mix of cars necessary to meet the demands of shippers, for which purpose the cars were acquired. The originating carrier is in the best position to know the requirements of its shippers and is in a far better position than another carrier 1,000 or 2,000 miles away to make judgment as to needs of local shippers. Although similar freight cars may be, and are used for many commodities having quite different loading characteristics, the cars that are purchased by any given line are those which will most nearly fulfill the shipping requirements of its patrons. Thus, railroads which load large quantities of grain will tend to own a large number of boxcars with door openings suitable for grain service. Roads which originate large quantities of lumber will tend to own large fleets of 50-foot boxcars with door opening of 14 or 15 feet. Other variations include car width, height, type of lining and capacity, both cubical and weight carrying.

In addition, railroads tend to maintain their cars to standards required to transport the traffic they

originate. A road originating large quantities of machinery of various types will be concerned with the condition of the floors in its cars, but need not attempt to keep side and end walls in condition to load products in bags. On the other hand, railroads originating large quantities of grain, flour, sugar, paper, and cigarettes must maintain exceptionally high standards of car body condition to provide the cars their patrons must have.

When a car owner receives the use of its own cars on an average of less than once each month, as occurs when less than 40 percent of owned cars are at home, and is required to rely heavily on foreign cars for loading, it is often difficult to find cars of the proper description and condition for the traffic offered even if a number of general purpose type cars are available on line. When in addition, general purpose type cars are also in short supply, the railroad that has purchased an adequate number of cars to satisfy its own shippers very often finds itself with an even more serious shortage than other lines with a deficient ownership of cars.

Under these conditions, there is little incentive for railroad managements to purchase large fleets of cars for general service, or to expend large sums of money in maintaining cars to high standards when, aside from per diem income, often the sole beneficiaries are other lines. Although it is almost impossible to estimate the revenue earning capacities of the ownership, by a single railroad, of common boxcars used in free running service, it is relatively easy to estimate the prospective income that will be derived from the acquisition of cars that will be used in various forms of assigned service. It is understandable why the railroads are now shying away from purchasing or owning general service equip-

ment in favor of cars used in assigned or controlled services. The number of cars in general service, on which the majority of the shipping public heavily relies, is steadily decreasing and causing shortages.

Assignment of Cars

The Bureau introduced reports prepared by field agents of the Bureau of Operations concerning pools of assigned cars at various points and reports involving the handling of controlled cars at specific points. The assignment of freight cars to specific shippers comes about through outright demands made by these shippers or the result of efforts by the carriers to meet the peculiar needs of their patrons. Typical of these needs are: the transportation of certain commodities in bulk, free of contamination by residue of previous loads; to reduce, or eliminate, packaging and blocking requirements by means of load restraining devices permanently or semipermanently affixed to the cars; to provide cars of particularly easy access designed to allow the use of mechanical devices for loading and unloading; or to insure an uninterrupted supply of freight cars of a particular type to the selected shipper. The carriers frequently stencil the body of the assigned car with the notation that when empty the assigned car must be returned to a specific shipper or location.

Controlled cars differ from assigned cars in that they are not assigned to a specific shipper but are kept under close control by the car owner and are not permitted to be loaded in general service by shippers other than those specifically designated by authorized employees of the car owner. Since 1950, rail carriers have acquired a large number of special car types at a considerably higher cost than conven-

tional cars which they have placed in services so controlled as to assure the owners complete control at all times, whether on or off line. Among the car types more commonly handled in this manner are: cars with cushion underframes, cars with interior loading devices to assist in stowing lading, insulated cars, cars of exceptionally high cubic capacity, covered hopper cars, special type flatcars and covered gondola cars. The agent for the owner at origin point usually places a notice on the waybill governing the loading movement stating that when empty the car should be handled in accordance with specific instructions and not placed in general service. The advantages of handling special type cars in controlled service are that the owner gains repeated use of expensive cars that are in demand on its own line and provides a means of securing return loads on cars that, if they were specifically assigned to certain shippers, would normally return empty. With the use of controlled cars, a carrier can offer certain shippers, often off-line, a supply of special type cars in return for maximum hauls and quite often free of demurrage. The practice has now grown to such an extent that some lines maintain large pools of these controlled cars at major terminals from which cars are dispatched empty to secure particularly desired traffic.

In his discussion of Rules 11 and 13 of the Code of Car Service Rules proposed by the Bureau, as shown in appendix B and discussed hereinafter, the examiner analyzed a number of the reports prepared by field agents of the Bureau of Operations relative to car assignments. He found that assigned car pools have become competitively essential to shippers and carriers and that there is nothing inherently unlawful about the assignment of cars. We agree with

some of these findings. Supplying special types of requested cars is a good business practice and necessary if the railroads are to meet regulated and unregulated competition from other modes of transportation, as shown in the record. We endorse this practice since it is in the best interest of the shipping public and the railroads themselves. However, unlike the examiner, we cannot ignore evidence of waste and special privilege resulting from this method of doing business. Instances were shown where carriers held cars for prospective loading from 4 to 80 days or more even though many of these cars belonged to another railroad. Based on a recent study, average turnaround time for cars in assigned service or pools is about 26 days as compared to the national average turnaround time for all cars of 18.42 days in 1964. The latter figure includes assigned and controlled cars which serves to inflate that of the general service fleet. In addition, the indiscriminate use of waiver or reclaim of per diem charges permits the originating line to comply with requests by shippers for additional cars and to pass on to other carriers a substantial portion of the idle car-days accumulated by cars held for prospective loading. Likewise, the failure to assess any demurrage or detention charges on cars held for prospective loading removes from the shipper any necessity of tempering his requests for assigned cars. The field reports show numerous instances where carriers failed to charge demurrage after cars were placed or constructively placed at shipper's plant. Railroads should be compensated by demurrage for car-days lost when a shipper exceeds the free time allowed under the applicable demurrage tariffs. It is only fair that a shipper which secures the exclusive use of equipment under an assignment should compen-

sate the carrier for this special privilege and that this shipper's transportation charges should not be computed on the same basis as that paid by other shippers on the same commodity but without the requested special service. As of October 1, 1964, and as estimated for October 1, 1965, over 70 percent of the equipped boxcars and over 60 percent of the covered hoppers were in assigned service. Since such types of equipment contain the most units of expensive equipment, these assignments represent a substantial dedication of the railroads' resources, and the railroads should be fully compensated for service furnished. This compensation denied to the railroads under present practices could be channeled into the purchase of general service cars which in turn would provide relief for the not so favored shipper.

It is evident that the system of placing cars in an assigned or controlled status has been overdone or oversubscribed. If the railroad industry is to continue this practice, assignments must be reevaluated and made more realistic. Of what purpose is it to assign 17 cars per day to a shipper who loads a maximum of 5 cars daily and an average of 18 cars per week. Other examples of oversubscription are contained in the field agent's reports and adjustments by some carriers and shippers were made only when the matter was brought to their attention. Other carriers, however, declined to realign their assignments, especially when shippers refused to cooperate in any decrease in their assigned pools. Evidence was also presented of instances where special car service orders were issued by the AAR or the Commission to relieve emergency shortages on certain roads which at the time had assigned equipment lying idle for prospective loading. On their returns to the questionnaire accompanying the order in this

proceeding, a group of carriers admitted that they were unable to furnish shippers on their rails with an adequate supply of 40-foot boxcars for their loadings, but at the same time each one of these carriers was willing to place their cars on another carrier's rails to protect traffic originating thereon and to subsidize that carrier by refund of car rental payments. One of the basic tenets of car supply, that is, a carrier should protect traffic originating on its own lines, is apparently being ignored. Such a situation we find to be unconscionable and one that must not be continued.

While some respondents argue that they obtain more use or faster turns out of assigned equipment than general service equipment, this is not the general rule. The few examples furnished by respondents of this fact only demonstrate that in those instances the assignments are realistic. Overall statistics convincingly show a waste of car-days because of indiscriminate assignments which contribute to the ever-present freight car shortage.

Car Service Rules

The efficient use of cars has been of major concern to railroad management and the Commission since the introduction of the principle of free interchange of cars between railroad lines. To cope with this problem, railroad management established a Code of Car Service Rules to be observed by all carriers on a voluntary basis. In 1916, during the height of wartime shortages, there was created a Railroad Commission on Car Service. Three members of that Commission, in a special report, gave the following reasons for its creation:

It is well established that the observance of car service rules with respect to returning equipment

promptly to owners has in the past been to a great extent superseded by use or appropriation of cars by individual lines governed only by expediency. A disregard for the spirit and letter of the rules on the part of a great many railroads has gradually led to an unsatisfactory observance of such rules in so far as they relate to the railroads collectively. This brought about a condition which rendered it impossible for some of the roads that had amply provided themselves with sufficient equipment to perform their obligations to the shippers directly served by them and their duties as carriers to the general public. (42 I.C.C. 702).

This Railroad Commission on Car Service attempted to relocate boxcars, after a study of location statements furnished by the railroads, but on January 11, 1917, it reported its inability to function effectively because certain railroads failed to give it their full cooperation, in spite of prior commitments to do so. Thereafter, in *Car Supply Investigation*, 42 I.C.C. 657 (1917), the Commission ordered the carriers to comply with this set of rules with respect to open-top coal and coke cars and railroad owned or controlled refrigerator cars. The rules then prescribed dealt with provisions as to how cars should be selected for loading or disposed of empty. They were directed principally toward requiring loading of cars back to or toward owner's rails to the fullest practicable extent once they had passed beyond those rails. The Commission's order for mandatory observance of these rules became effective February 21, 1917, but an expiration date of May 1, 1917, was included in the order. After that date, the rules were subject to voluntary observance, reinforced by emergency service orders of the Commision to facilitate an equitable distribution of freight cars throughout the Nation.

These emergency service orders issued under section 1(15) of the act require, among other things, the prompt handling of cars by carriers, return of certain specific ownership to owning lines, that loading of certain cars to specified areas be restricted, that free time on cars awaiting unloading at certain stations be reduced, that penalty charges for detaining cars be imposed, and that restrictions be placed on circuitous routing and light loading of cars. The above measures are all designed to improve utilization of the freight car fleet. While these emergency steps have been helpful, as testified to by a number of shippers and respondents, they are merely temporary and serve to cure the immediate problem only.

In *Car Service, Freight Cars, supra,* the Commission in 1947, as mentioned earlier herein, required the carriers to file their car service rules, but again voluntary compliance was relied on to secure an equitable distribution of freight cars. From the evidence of record it is obvious that voluntary observance of these rules has not been the answer to this most vexing problem. Car shortages still exist. We have given the railroad industry every opportunity to provide a solution and have stood by hopefully waiting for the desired result. It is time that some positive action is taken, and we intend to do so now.

Emergency car service orders have served to provide some relief during critical periods but this, at best, is only a partial solution to the problem before us. Therefore, we will prescribe a number of car service rules under the authority provided in section 1(14)(a) of the act to be observed by all carriers at all times. We have carefully studied the rules and regulations proposed by the Bureau of Operations and the new Code of Car Service Rules prepared by the AAR during the course of this proceed-

ing and adopted by a substantial majority of the AAR membership on October 1, 1967. As mentioned earlier herein, the rules proposed by the Bureau of Operations are shown in appendix B, and its proposed regulations are listed in appendix C. The revised Code of Car Service Rules adopted by the AAR is shown in appendix D.

There is little difference between the rules proposed by the Commission personnel and those adopted by the AAR. In recognition of this, and in the interest of making it as acceptable as possible to the rail carriers, any rules that we will prescribe for mandatory observance will follow the format of those adopted by the railroads themselves through the AAR to be used on a voluntary basis. It is not our purpose to burden respondents with a mass of meaningless regulations or to encumber their operations. We are also mindful of the dangers involved in placing restrictions on the use of cars which may hamper the rail lines in providing the type and number of cars required by their individual shippers and which could lead to a loss of traffic to competing modes. Our purpose herein is to induce the carriers to cooperate more fully among themselves and to provide some relief to the general shipping public which has not been receiving the same car service as a number of favored shippers.

The continuing relocation of cars on owner's lines is of major importance to the maintenance of an adequate car supply. Therefore, we believe that car service rules that provide for the routing of foreign cars to or in the direction of home lines should be prescribed for mandatory observance. Rules 1 and 2 of the AAR Code, as shown below, are designed for that purpose:

CODE OF CAR SERVICE RULES

Rule 1 Foreign cars, empty at a junction with the home road, must be:

(a) Loaded at that junction to or via home rails, or,

(b) Delivered empty at that junction to home road, except in instances where Rule 6 has been invoked, or unless otherwise agreed by roads involved.

Rule 2 Foreign empty cars other than those covered in Rule 1 shall be:

(a) Loaded to or via owner's rails.

(b) Loaded to a destination closer to owner's rails than is the loading station or delivered empty to a short line or switch loading road for such loading. (Car Selection Chart is designed to aid in so selecting cars for loading.)

(c) Delivered empty to the home road at any junction subject to Rule 6.

(d) Delivered empty to the road from which originally received under load, at the junction where received, EXCEPT that when handled in road haul service, cars of direct connection ownership may not be delivered empty to a road which does not have a direct connection with the car owner.

(e) Returned empty to the delivering road when handled only in switching service.

Note.—Boxcars covered by Car Service Division Special Car Order No. 90 should be handled as provided therein.

Notes to car service Rules 1 and 2:

(A) 1. "Junction" as used in these rules means stations where roads interchange cars at a common

point or within switching limits over their own lines, or an intermediate line or lines, or a car ferry or float within such limits. Roads so interchanging cars shall be considered direct connections.

2. This information should be published in THE OFFICIAL RAILWAY EQUIPMENT REGISTER, and when the interchange is other than over their own rails, the channel through which the interchange is effected must be shown.

(B) Inequities resulting from these rules should be resolved by negotiations between the roads involved, and exception to the rules is permitted following such resolvement and concurrence by the Car Service Division.

These two rules are basically the same as those prescribed by the Commission in *Car Supply Investigation, supra*, to be observed for a short period, as noted earlier herein, and identical to rules 2 and 3 of the proposed rules of the Bureau of Operations, as shown in appendix B. They are not designed to improve the utilization of freight cars, except insofar as return loading is compatible with the primary objective of increasing availability of cars to the owner. Thus, improved utilization will be largely in control of the owner who can then provide for the needs of his shippers for whom the equipment was acquired. The greater availability of owned cars rather than haphazard reliance on the supply of foreign cars will provide the owner with an opportunity to measure more accurately its ownership requirements. It will also permit the owner to maintain the car in a condition suitable for use when it is returned. Enforcement of the rules will shift the responsibility for shortages to the railroad with inadequate ownership and compel such a railroad to increase its fleet and to provide better

maintenance for its cars. If a railroad has assurances that it can secure frequent and repeated loadings of its own cars, and if it is prohibited from indiscriminate use or misloading of someone else's cars, it will tend to correct any ownership deficiencies it may have. Moreover, once it is in a position to know what ownership levels it must maintain, it will also be able to justify the investment required. Although mandatory observance of these two rules may create shortages on roads which own insufficient equipment, as argued by certain respondents, the needs of shippers affected should not be met with equipment of carriers which obtained the cars to serve other shippers.

There has been widespread disregard of these two rules since their adoption by the AAR over 50 years ago and especially in recent years. During the month of October 1965, field examinations were conducted by agents of the Bureau of Operations pertaining to the rail carriers' practices in the loading of boxcars towards owners as required. A total of 3,763 cars were checked of which 1,837, or 49.8 percent, were found to be loaded in violation of the two rules. Disregard of the rules by some carriers was more flagrant than others, resulting in violations at certain stations as high as 94 and 90 percent. Many of the respondents do attempt to comply with the regulations in handling foreign cars, but when in times of shortage or emergency the rules are ignored. It is at this time, however, that observance of the rules is most important since a shortage on one line is usually the situation on some other lines. It also appears that some carriers use the rules only as a defense mechanism. The rules are employed as a means of disposing of surplus empty foreign cars and as a means of protection from handling empty cars a line does not want and is not obligated to accept. Although the above are proper

and legitimate use of the rules, they have a more positive purpose. The main purpose is to return to the owner, preferably under load, cars which it has acquired for its own traffic.

Objections to the mandatory observance of these rules were made by a number of respondents which argue that it would increase empty mileage. The objections are based on the circumstances of a foreign car unsuitable for loading because of improper ownership moving back towards the home line for a distance alongside a system car which the rules require the originating carrier to use. This, they contend, will increase empty mileage. Contrary to their argument, empty car miles will be reduced in the long run if cars are used in accordance with the rules.

Some shippers object strenuously to rules 1 and 2 because of the effect of restrictions on their loading operations. While observance of the rules may require some extra switching and short delays, this small inconvenience and perhaps additional expense is a small price to pay for the overall benefit to be derived when originating lines obtain quick return of their system cars which were acquired to satisfy the needs of local shippers.

We see no reason at this time to prescribe rules 3, 4, 5, and 6 of the AAR Code, but do believe they should be followed. Rule 6 provides protection for the carrier delivering loaded traffic to a connection against the possibility of that connection returning empty cars at a junction less favorable to the initial carrier than used originally. We are listing it here for information purposes since it is to be applied in conjunction with prescribed rules 1 and 2.

Rule 6 If a movement of traffic requires return of empty cars to home road via the junction at which cars were delivered in interchange under load, the

home road may demand return of empty cars at such junction, except that cars offered a home road for repairs, in accordance with the Interchange Rules of the Mechanical Division, must be accepted by owners at any junction point.

Note.—Notice of an intent on the part of any road to invoke the provisions of this Rule should be issued by the designated transportation officer to the designated transportation officer of the road to which the notice is addressed, such notice to specify the type of cars and particular junction points involved. Such notice may not limit acceptance to the individual cars previously delivered, but may require the return of an equivalent number of home cars of the type specified, at junction point where delivered loaded.

INTERPRETATIONS

1. The words "Movement of Traffic" in this Rule mean the movement regularly through any junction point of any kind of traffic in (or on) the same class of car.

2. Car Service Rule 6 gives to a railroad which may deliver regularly, to a connection through any junction, traffic of any kind in (or on) its cars of the same class, the right to require connection participating in the handling of traffic from the junction point, to use that point of interchange for the return of the class of empty cars engaged in the service, instead of returning them at some other junction less favorable to the receiving (owning) railroad. (April 25, 1923).

We will require mandatory observance of rule 7, shown below, which establishes the obligation of the delivering and receiving carrier in effecting the interchange of cars and provides the carrier with a uniform definition of the meaning of the term interchange.

Rule 7(A) Cars shall be considered as having been delivered to a connecting railroad when placed upon the track agreed upon and designated as the interchange track for such deliveries, accompanied or preceded by necessary data for forwarding and to insure delivery, and accepted by the car inspector of the receiving road.

Notwithstanding the foregoing paragraph, the receiving road shall be responsible for the cars, contents and per diem after receipt of the proper data (1) for forwarding and to insure delivery. This responsibility shall continue as respects cars rejected by the car inspector of the receiving road until such cars have been returned to the delivering road. The effect of this paragraph may be altered by special arrangements made between the roads concerned.

(1) *Note.*—The character of the necessary data will be determined by each receiving road in accordance with the conditions of its service.

(B) (1) Each railroad, with due regard for efficient and economical railroad operating practices or conditions beyond the carriers' control, will interchange within 24 hours after arrival or release at interchange station, all cars which it properly may interchange in accordance with the provisions of Section (A) of this rule, subject to the following exceptions (2) to (4) inclusive:

(2) Cars covered by an embargo.

(3) Cars covered by written or telegraphic notice given by the intended receiving line stating that it is unable to receive.

(4) Cars which cannot be placed physically upon the designated interchange track.

(C) When interchange required by Section (B), Paragraph (1) of the rule cannot be accomplished, the provisions of Per Diem Rule 15 will apply.

INTERPRETATIONS

Question.—After a car has been accepted by the inspector of the receiving road, is the delivering road relieved from responsibility for damage to car and contents?

Answer.—Yes (June 20, 1924).

Question.—Where a car has been accepted by the inspector of the receiving road, but is not accompanied or preceded by proper data for forwarding and to insure delivery, is the receiving road relieved from responsibility for damage to the car and contents?

Answer.—No, but the rule gives the right to receiving road to refuse to accept in interchange cars which are not accompanied or preceded by proper data for forwarding and to insure delivery, and when such cars are not accepted in interchange they are still in the possession of the delivering road. (June 20, 1924).

(2) When a loaded freight car containing a shipment destined to a non-agency station (a station at which there is no freight agent), billed collect or insufficiently prepaid, is offered in interchange, it shall be accepted from the connecting carrier and forwarded to destination. (January 25, 1926).

(2) *Note.*—Rules of the A.A.R. Accounting Division make provision for the adjustment of freight charges between the originating and the delivering carrier.

We are listing Per Diem Rule 15 herein for information purposes only since it is to be applied in conjunction with prescribed Car Service Rule 7.

Per diem rule 15.—

(a) A road failing to receive promptly from a connection cars on which it has laid no embargo, shall be responsible to the connection for the per diem on cars

so held for delivery, including the home cars of such connection.

A road failing to receive promptly from a connection empty cars at home on its road, moving home under Car Service Rules, shall be responsible to the connection for double the per diem on such cars held for delivery after the first day for which reclaim is made.

(b) If such failure to receive shall continue for more than 3 days, the delinquent line shall thereafter in addition be responsible for the per diem on all cars wherever in transit which are thus held back for delivery.

(c) It shall be the duty of the connection intending to reclaim to notify the delinquent line daily, prior to midnight, through the designated representative at the point where cars are offered, of the total number of cars so held for it, and within 48 hours from midnight of the day cars are offered furnish the initials and numbers of the cars.

(d) The reclaim accruing under this rule on a car handled in terminal switching service can only be made for the detention in excess of the reclaim allowable under Per Diem Rule 5.

(e) When the hour at which the receiving road clears the interchange track is so late that the delivering road cannot place on interchange track before midnight, cars which it is holding for delivery, the receiving road shall be responsible for the Per Diem on such cars for the following day, subject to local agreement as to time required to make delivery.

(f) This Rule shall apply in connection with loaded cars interchanged between a common carrier by water and a common carrier by railroad except where in conflict with applicable tariffs and divisional agreements.

(g) This Rule shall apply in connection with empty cars interchanged between a common carrier by water and a common carrier by railroad.

INTERPRETATIONS

15(a) *Question.*—In case a car held for a certain road is not delivered to that road, can reclaim be made against such road?

Answer.—No.

15(b) *Question.*—Is it necessary to furnish initials and numbers of cars held which have previously been reported by initials and numbers?

Answer.—No.

15(c) *Question.*—When a road cannot accept cars from a connection, is it necessary for the connection to notify the delinquent line before midnight each day of the total number of cars held for which reclaim is to be made?

Answer.—Yes.

15(d) *Question.*—When a road has invoked the provisions of Car Service Rule 6 and cars are offered to that road at another junction point, is the holding road entitled to reclaim under Per Diem Rule 16?

Answer.—No.

In a series of reports prepared by Commission field agents, instances of delay of cars at terminal and interchange points were shown during August, October, November, and December 1965 and January 1966. Sixteen terminals and interchange points were checked in 10 States, on the lines of nine rail carriers. Of the total of 5,419 loaded cars checked, 1,189 cars or 21.94 percent had been delayed in excess of 24 hours, some in excess of 20 days. Although there is no way of measuring the exact number of movements through terminals and interchange points that are made by

each loaded car, it is reasonable to assume that there is at least one interchange or terminal movement for each car loaded. Applying the 21.94 percent of delay found in the sampling made by Commission agents to the 31,229,884 cars known to be loaded during 1964, it is estimated that 6,851,837 car-days were lost during 1964 because of delays to loaded cars at terminals or in movements from interchange points. The above figure for car-days lost is a very conservative estimate since it is based on only a single day lost for each car whereas the field study showed that most cars are delayed more than a single 24-hour period.

Reference to the Bureau's proposed rule 7, as shown in appendix B and Car Service Rule 7 above demonstrates that they are similar, except for paragraphs (B) (1) where the rule prescribed herein contains the provision that the required interchange be made "with due regard for efficient and economical operating practice or conditions beyond the carriers' control" and (B) (5), dealing with interchanges at which there is no daily train or switching service. The above-quoted provision in rule 7 (B) (1) should not be used as an excuse for carelessness or indifference, but only for conditions which could reasonably be beyond a carrier's control. In view of paragraph (B) (4), and the above-quoted portion of paragraph (B) (1), there appears to be no need for paragraph (B) (5). The change in paragraph (C), and the addition of paragraphs (D) and (E) by the Bureau in lieu of AAR Per Diem Rule 15 do not appear to be worthwhile and would be unnecessarily burdensome to the carriers.

Rules 8 through 14 will not be prescribed since, in general, a required observance thereof will not have any appreciable effect on improved utilization. However, a brief discussion of Car Service Rule 12 is in order. As shown in appendix B hereto, the Bureau's

Recommended Car Service Rule 9 would provide that: Cars containing refuse must not be offered in interchange as empty cars.

Car Service Rule 12, as revised, now provides that:

Cars containing refuse may be rejected by the receiving road when offered in interchange as empty cars.

The Bureau does not advocate mandatory prescription of this Car Service Rule. It is obvious that, as now worded, the rule is permissive and its inclusion as a prescribed rule would still allow discretionary action. Moreover, since respondents are proposing to establish a special charge to be assessed when freight cars are returned as empty but contain various foreign material,[2] it would be inappropriate for us at this time to prescribe rule 12 or a modification thereof, for mandatory application.

Rule 15, in our opinion, is of major importance since the record indicates that one of the prime reasons for undue delays in the utilization of equipment is the lack of adequate information secured by the carrier from the shipper. Car Service Rule 15 is substantially similar to the Bureau's Recommended Car Service Rule 12 except that the latter includes items 6 and 7 which provide for certain restrictions with respect to service by switching carriers. Item 6 would, in appropriate instances, forbid loading of a switching carrier's equipment for movement beyond its own lines. Item 7 would require the road-haul and the switching carriers to observe the Car Service Rules

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[2] I. and S. Docket No. 8363 (Sub-No. 1), *Special Unloading Charge, At Destinations in the United States.* A petition for reconsideration of the Decision and Order of Division 2, dated August 20, 1968, finding such a charge not shown to be just and reasonable was granted by order of July 10, 1969, and the issues are to be orally argued on September 11, 1969.

with respect to car orders. We believe that item 6 is inappropriate since it would deny the switching carrier the right to load its own equipment. This could forestall the incentive for purchases of equipment by such carriers. Since Car Service Rules 1 and 2 are prescribed herein, we see no need for item 7. Respondents admit that rule 15, as revised recently, is necessary to secure adequate information for operating purposes because:

To the extent such information is presently known to the shipper but has not customarily been furnished the carriers' car distributors, it will be provided in the future.

To assist respondents in this endeavor to secure more adequate records, we shall prescribe rule 15 for mandatory application. Rule 15 is set out below.

Rule 15.—(1) Carriers shall record all requests for cars for loading, which shall include the following information if available:

(a) Date and time.
(b) Name of party.
(c) Name of person receiving request.
(d) Kind and size of cars wanted.
(e) Number of cars wanted.
(f) Date wanted (See Note 1 below).
(g) Commodity to be loaded.
(h) Destination and route.

Note 1.—If order covers more than one date it must state number of cars wanted separately for each day.

(2) Request for cars shall be accepted only by the road on which the car is to be loaded.

(3) On cars originating in switching service, the road performing the switching service shall, if cars of suitable ownership under these rules are immedi-

ately available, furnish cars for loading for road-haul via another carrier. If such cars are not immediately available, the switching carrier shall immediately order suitable cars from the designated road-haul carrier in the manner required by paragraph (1). Cars ordered by switching carriers from road-haul carriers for return loading in road-haul service will be furnished by road-haul carriers in the same manner and to the same extent as cars ordered by industries directly served by it.

(4) Switching carriers are obligated to furnish or arrange for cars required for loading to destinations within the same switching limits.

Rule 16, which is of major importance because it governs the assignment of cars to shippers for their exclusive use will also be prescribed.

Rule 16.—(A) When, after the effective date of these rules, specific cars covered by CSD 145 and 435 series are assigned to a shipper for his exclusive use, such assignment shall be made subject to the following conditions:

1. Shipper must request in writing of originating road-haul carrier(s) assignment at least ten (10) days before their intended use of a specific number of cars. If originating carrier(s) agrees to such assignment but desires other road-haul carriers to participate in assignment, it will advise shipper accordingly and will make request on such other carriers.[3]

[3] Subsequent to the service of the recommended report and the filing of exceptions thereto, the following sentence was added: "A road-haul carrier may assign cars but must have the concurrence of the originating carrier which may or may not be a switching carrier." We are not including the quoted portion in our prescribed Car Service Rule 16. However, our findings and conclusions and the order entered herein provide for changes in the rules in appropriate instances.

2. Pools of assigned cars including cars of ownership other than the originating road-haul carriers may be expanded only upon the acceptance by the originating road-haul carriers.

3. When cars are assigned in accordance with this Rule, they shall remain and be treated as assigned cars until the shipper or owning railroad notifies the other and the originating road-haul carrier(s) in writing at least ten (10) days in advance that such assignment is modified or canceled.

(B) Assigned cars shall not be held empty en route to loading point, except as follows:

(a) Upon written instructions of assignee.

(b) When assignee cannot immediately accept on arrival at loading point and cars cannot reasonably be held on other tracks at loading points.

(c) For necessary repairs (not cleaning).

(C) The present and future assignment by a carrier of specific cars for the exclusive use of a shipper at a particular point shall be reported by such carrier to the Operating-Transportation Division of the Association of American Railroads by car initial, number, car type code and specific assignment. Each carrier assigning such cars shall advise the Operating-Transportation Division of the Association of American Railroads of any change in assignment not later than the last working day of the month in which change occurred. The Operating-Transportation Division of the Association of American Railroads will maintain a current record of cars assigned, and distribute such information to car owners assigning cars to a specific shipper at each location, as well as to the roads originating traffic from such assignments, including originating switching line serving the shipper involved. The foregoing provisions of this paragraph

shall not apply when all cars assigned to the exclusive use of a shipper at a particular point are system cars of a single road-haul carrier serving the shipper at such point.

(D) Assigned cars are exempt from Car Service Rules 1 and 2 at initial loading stations.

As discussed and found earlier herein, the practice of assigning cars to specific shippers or placing cars in controlled service has been abused and at the expense of respondents. Under rule 16 the practice will be restricted to a reasonable basis and the records maintained by the AAR will be made available to the Commission. With these records in hand, both the AAR and the Commission will be able to survey the assignments for the purpose of eliminating oversubscription and wasted car-days.

Rule 17 which prohibits the holding of loaded cars at any point between origin and destination, except to make repairs and to provide services specifically authorized by the tariffs, or for other specified causes will also be prescribed.

Rule 17 Loaded cars will not be held at any point between origin and destination, with due regard for efficient railroad operating practices, except as follows:

(a) To perform any service specifically authorized by applicable tariffs.

(b) To make necessary repairs to cars, including adjustment of lading.

(c) To obtain necessary authority for movement of car, or to obtain authority for transfer or rearrangement of lading, when loaded to dimensions or weights in excess of those published in Railway Line Clearances.

(d) When consignee is unable to accept immediately upon arrival and car cannot reasonably be held at destination.

(e) Cars loaded in violation of an embargo.

(f) When normal route of movement is blocked because of accident, high water, damage to track or other disability of this railroad.

This rule, in conjunction with rule 7, should help to eliminate delays occurring at terminals and interchange points. We have already noted the car-days lost because of failure to interchange or deliver cars promptly in our discussion under rule 7. Again, this rule is similar to one proposed by the Bureau (rule 14) except for the qualifying phrase "with due regard for efficient railroad operating practices." Such a qualification should not interfere with the primary purpose of the rule, which is to make clear that intentional delay by the carrier, except as authorized by applicable tariffs, is prohibited.

Rule 18 provides for the use of reasonable diligence in the placing and removal of cars. It also provides that each railroad will, with due regard for efficient railroad operating practices, hold no more cars than are necessary to protect current requirements of shippers served. This rule, as shown below, will also be prescribed and should serve to further improve utilization of the freight car fleet.

Rule 18 1. Each railroad will undertake to:

(A) Placing of Cars:

(1) Use reasonable diligence to place loaded cars promptly following arrival at destination.

(B) Removal of Cars:

(1) Carriers shall use reasonable diligence to promptly remove empty cars from point of unloading

or interchange tracks of industrial plants following unloading or release by consignee or shipper, unless such empty cars are ordered or appropriated by the shipper with approval of carrier for reloading.

(2) Carriers shall use reasonable diligence to:

(a) Promptly remove outbound loaded freight cars from point of loading or interchange tracks of industrial plants following acceptance by carrier of shipping instructions; and

(b) Thereafter promptly forward such cars in line-haul service.

(3) Cars subject to Paragraphs (B) (1) and (B) (2) which are not in fact made accessible to the carrier because of the actions of the consignee or consignor, shall be deemed not to have been released until such cars are in fact made accessible to the carrier.

2. Each railroad will, with due regard for efficient railroad operating practices, hold no more cars for prospective loading at any time for any industry which it serves, than those needed to protect current requirements.

Commission field agents conducted a survey concerning placement of cars for unloading at various destinations throughout the United States. A total of 21,257 cars were surveyed at different times during the period from November 1964 to January 1966. Of that total 1,948 or 9.16 percent were delayed 1 or more days prior to placement for unloading. Applying the 9.16 percent of delay found above to the 31,229,884 cars known to be loaded during 1964 there would be 2,860,057 cars delayed 1 or more days for placement at destination. If each of these cars had been placed 1 day sooner there would have been that many car-days available for transporting freight.

A similar survey concerning removal of loaded and empty cars from tracks serving shippers or receivers at various points was also conducted. There were 17,197 cars checked and delays were noted as to 965 cars or 5.6 percent of those checked. Most delays, according to examples of specific cars, were from 3 to 7 days. Applying this percentage to the 31,229,884 cars loaded during 1964, each of which had to be removed once from tracks serving shipper and once from tracks serving consignee, the loss of usable capacity resulting from failure of carriers to remove cars from tracks serving patrons was 3,503,992 car-days.

In summary, we believe that the Car Service Rules prescribed for mandatory observance will contribute towards a better utilization of the existing national car fleet. Our purpose in prescribing certain of these rules is to facilitate the optimum use of the national car fleet with a minimum of disturbance to respondents' operations. In order to further these endeavors, we shall order the publication in the Federal Register of the prescribed Car Service Rules so as to disseminate this information to interested persons and the general public.

Formula for Determining Adequacy of Freight Car Ownership

Three formulas were presented for computation of car ownership deficiences or excesses, one by the AAR and two by the Bureau of Accounts. All are designed to determine adequacy of ownership by types of car. The two Bureau of Accounts formulas reffect the dichotomy of theories as to car ownership responsibility: responsibility based on loads originated, which has been the predominating ownership concept through the years; and responsibility based

on participation in use of cars measured by days on line. The latter theory was also adopted by the board of directors of the AAR where at a special meeting held on August 26, 1966, they approved an ownership formula to serve as a guide to measure each railroad's responsibility for ownership of general purpose cars. Both the Bureau of Accounts and the AAR directors advocate use of a so-called interline car-day formula which, in addition to providing sufficient ownership to protect a carrier's origination in local service, would insure that each railroad owns cars in numbers equal to its proportionate use of the national fleet in interline service. It is concluded that this type formula is equitable because interline service is a profit venture in which all roads participate to the extent of their proportionate use of the freight car fleet. Since an interline formula will be the most equitable means of establishing car ownership requirements, we shall give no further consideration to the formula designed by the Bureau of Accounts which is based mainly on loads originated and which is shown in appendix D to the examiner's report. The interline formula proposed by the Bureau of Accounts is shown herein in appendix E[4] and the AAR formula in appendix F.

The formulas of both the Bureau of Accounts and the AAR develop car ownership requirements by similar methods, except that the latter provides for credit against interline car-days accumulated by foreign cars loaded and delivered to connections in compliance with car service rules. Essentially, both

[4] Reference in the formulas shown in appendixes E and F to specific sections and items are those so cited in appendix A hereto. References in the formula in appendix E hereto to appendixes C, D, E, and F are to those shown in the questionnaire attached to the order of July 29, 1964.

formulas develop car requirements, except for the car service rule compliance credit, by the following steps: (1) Compute the number of serviceable cars required to protect traffic carried by dividing serviceable car-days of cars on line by the days in the period for which the requirement is to be determined; (2) Compute the number of serviceable cars required to protect shortages by multiplying the reported shortages (reduced by 50 percent in the AAR formula) allocated between local and interline on the basis of car loadings by the computed local turnaround time (serviceable car-days divided by carloads originated in local service) and by the national average turnaround time for interline service; and (3) Adding the computed cars required to protect shortages to the computed cars required to protect traffic carried. Both formulas would require application of data for each type of car for which requirements were to be determined.

We believe that the AAR formula shown in appendix F with its credit provision for Car Service Rule compliance is preferable because it provides added incentive to comply with car service regulations thereby improving utilization of the available freight car fleet. Moreover, it would serve to reduce car owners' requirements by returning cars to owners which would then have them available for loading. In addition, the 50-percent deduction in reported shortages utilized by the AAR in its formula is necessary and warranted. The examiner criticized this figure on the grounds that it was arbitrary, but it was justified on the record to our satisfaction. It is well recognized that many reported shortages are inflated due to overordering by shippers in periods of tight car supply. Orders may be placed with two or more railroads; frequently there is repetitious re-

porting of shortages from day to day. Furthermore, responsible AAR witnesses testified that based upon their experience, over the years, such an adjustment in reported shortages is realistic. We also find some merit to respondents' argument that, in periods of extreme heavy loading, the railroads cannot be expected to fully meet every single request for a car since an ownership which is adequate during peak loading periods would result in idle cars throughout many other periods of each year. Thus, the above-mentioned 50-percent adjustment should compensate for the above circumstances.

The formula is to be directed only to serviceable general purpose cars by type. A general purpose car is any car which under prescribed rules may, after release from load, be used for reloading to any destination in accordance with the Car Service Rules with any commodity for which cars of the same generic type are suitable and are normally used. Such cars will generally consist of plain boxcars, plain gondolas, plain flatcars and open-top hopper cars.

Our purpose in discussing and approving the AAR formula is to provide a guide whereby each railroad can measure its responsibility for ownership of general purpose cars. We have shown and found that there is a shortage of freight cars among respondents as a group, but we have been unable to make such findings as to single carriers. With the aid of the formula, however, carriers individually should be able to determine their deficiencies and to take steps thereafter to acquire the cars needed to protect their requirements. Therefore, we will require respondents to collect data during the month of October of this year and each succeeding year thereafter until further order, for the purpose of applying that data to the approved formula herein and to thereby

determine their car needs. The data to be gathered should be based upon that shown in appendix A herein to the extent necessary for the application of the approved formula in appendix F, but for the appropriate year, in this instance, 1969. Anticipated loadings should be estimated for a similar period in the following year. As mentioned, appendix A is derived from the questionnaire attached to the order issued in this proceeding.

There appears to be some question as to how the credit provision for the use of foreign cars in compliance with the Car Service Rules is to be applied. We believe the procedure is adequately outlined in items 12 through 14(a) of appendix F hereto. The observance checks noted in item 13 of appendix F should be performed by the AAR Car Service Division on a basis of five districts (eastern, southern, northwestern, central western and southwestern), over a set period of time. We believe a period of 4 months would be adequate to obtain this information and should be completed during or shortly after the October data is collected. By June 30, 1970, and each year thereafter until further order, we will expect each carrier to report to the Commission the results of the application of the formula to the data collected in October 1969, and each succeeding year, and the steps taken to cure the deficiencies indicated, or reasons provided why such measures were not taken. The reports to be submitted by June 30 of each year will give respondents and the Commission ample time to review the data before the peak season. Questions regarding application of the formula should be directed to the AAR. The underlying data used in the formula must be filed with the Commission.

We do not contend that the endorsed formula is perfect, or that it cannot be improved upon. It may require revision or refinement based upon experience over a period of time. However, it is the best available and was designed and endorsed by respondents' own organization. According to the AAR, arrangements effective January 1, 1967, were made to collect data necessary for implementation of the formula which should minimize any burden created by our requirement that it be followed.

In our opinion, any meaningful increases in total car ownership can only be realized by application of systematically collected data to the approved formula over a substantial period of time. We do not intend to permit a hiatus of 22 years to again intervene before we reexamine the adequacy of car ownership by respondents.

Respondents and certain interveners contend that any action on our part in this proceeding is foreclosed by the decision in Ex Parte No. 252, *Incentive Per Diem Charges*, 332 I.C.C. 11 (1967). We do not agree. This proceeding was separately instituted for a specific purpose. In Ex Parte No. 252, the Commission, based on recently enacted legislation, examined the need for the imposition of an incentive element, on an interim basis, for the use of freight cars in order to encourage the purchase of freight cars. The application of Car Service Rules and other matters were not in issue, *Incentive Per Diem Charges, supra*, at page 18. Moreover, in this proceeding since we are not prescribing rates such as those considered in Ex Parte No. 252, we do not require the detailed precise data which the Commission found to be necessary but absent in Ex Parte No. 252. As in Ex Parte No. 252, the Commission in this proceeding is concerned with a common prob-

lem: The adequacy of railroad transportation service to meet the needs of the Nation for such service. In our discretion, we have chosen to meet this common problem by a number of methods, including requests for new legislation and by administrative action involving adjudicatory and rulemaking proceedings. We have, for example, used a similar multifaceted approach to the problems concerning *Small Shipments*. Consequently, respondents' and interveners' arguments are misplaced. However, in view of the pendency of Ex Parte No. 252 (Sub-No. 1), it would be inappropriate for us to further discuss the issues raised in Ex Parte No. 252. Accordingly, these contentions of respondents and interveners will be given no further consideration.

CONCLUSIONS

From the evidence adduced and official notice taken of congressional hearings, numerous complaints by shippers to the Commission and various studies made in and outside the Commission, we are convinced that there is a continuing freight car shortage which requires affirmative, remedial action at this time. We believe that this situation results from a combination of an inadequate ownership of general purpose type freight cars by respondents as a group and improper utilization of the available freight car fleet. As mentioned earlier herein, we have given respondents every opportunity to eliminate this problem but they have been unable to bring forth a solution. In our opinion, respondents and certain interveners offer no realistic alternatives for a resolution of the vexing problems of a diminishing national car supply. Reference to respondents' managerial discretion tends to focus on the conclusion that a resolution of the car supply problems will, in

the last analysis, largely depend on affirmative action initiated by this Commission. Therefore, we will attempt to supply this solution by requiring mandatory observance of the rules set forth in appendix G and the filing of reports by respondents individually as to the adequacy of their individual fleet, after application of the approved formula set forth in appendix F, showing what steps, if any, have been taken to cure inadequate car ownership. We have stated and considered numerous criticisms which the proposed rules and formulas have evoked. In recognition of these criticisms and practicability of the rules proposed, we have rejected those shown to be unreasonable or unduly burdensome and adopted only those believed to be necessary and advisable. It is unlikely that all possible infirmities and ramifications could be foreseen, however, the experience of actual use should expose weaknesses and demonstrate the value of the rules prescribed. With this in mind, for the possible need to supplement the rules prescribed, to revise or to refine the formula endorsed, and for the submission of yearly reports in conformity with the previous discussion with respect to the approved formula, we shall hold the proceeding open.

FINDINGS

Upon further study, we find that respondents as a group lack an adequate freight car supply and fail to furnish adequate freight car service. We further find that respondents should be ordered to observe the Car Service Rules prescribed in appendix G herein and to prepare a report, to be filed by June 30, 1970, and each succeeding year thereafter until further order of the Commission, showing the results of the application of data collected during the period October 4-October 31, 1969, inclusive, and for

the entire month of October in each succeeding year, to the approved formula in appendix F herein, and further showing what steps have been taken to cure the inadequacies indicated. In order to facilitate compliance with the prescribed rules, we further find that the prescribed Car Service Rules in appendix G herein should be published in the Federal Register. The proceeding will be held open.

An appropriate order will be entered.

APPENDIX A

Section I—*Revenue cars loaded*

Item (A)—*Revenue or nonrevenue freight loaded in revenue cars for road haul.*—Report all revenue cars loaded with revenue or nonrevenue freight on your line or received from connections in switch service for initial road haul and billing by your line, for each of the five periods requested. These periods are October 1-3, 1964 (3 days) and the four weekly periods ended October 17, October 24, and October 31, and total loadings for the 31 days of October 1964. Report average weekly loadings for the 4 weeks ending October 31. (See item (C) for cars billed by and received from all class II railroads and switching and terminal companies.)

Item (B)—*Loaded for intra-terminal or inter-terminal switch movement.*—(not included in (A)). Report all revenue cars loaded with revenue or nonrevenue freight for intra-terminal (including intra-plant) movement or terminal movement at applicable switching charges (exclude cars delivered to connection for billing), for each period requested: Also total for the month of October and average weekly loadings for the 4 weeks ending October 31. (Report

only loads in cars, either railroad or private owned, which are normally used in interchange service.)

Item (C)—*Loaded on short lines.*—Report all revenue cars loaded with revenue or nonrevenue freight billed by and received from all class II railroads and switching and terminal companies. Also the total for the 31 days of October and average weekly loadings for the 4 weeks ending October 31. List on a separate statement the names of each railroad and switching and terminal company, and the total number of cars received from each of them, for each period requested: Also the total for the 31 days of October 1964.

Item (D)—*Total items (A), (B), and (C).*—Total all cars loaded by periods. Also total for the month of October, and a weekly average for the 4 weeks ending October 31, 1964.

Section II—*Anticipated carloadings*

Same period 1965.—Estimate average weekly carloads, corresponding to section I, item (D), to be originated for the 4 weeks ending October 30, 1965, *based on no car shortage.*

Section III—*Revenue cars*

Item (A)—*Cars reported in section I, item (D) and terminated on line.*—Using the totals for each of the five periods in section I, item (D) report all carloads which originated on your line and terminated on your line: Also total for month of October and the weekly average for the 4 weeks ending October 31, 1964.

Item (B)—Cars reported in section I, item (D) which were delivered to connections.—Using the five period totals reported in section I, item (D), report all carloads which originated on your line and were delivered to connections in interline service: Also

total for the month of October and the weekly average for the 4 weeks ending October 31.

Section IV—*Received from connections.*

Item (A)—*Loads.*—Report total cars received loaded in interline service from class I connections during the month of October, separated (1) *Cars terminating on your line;* (2) *Delivered to connections;* (3) Total loads received from class I connections; and (4) *Weekly average.* (Total loads, divided by 31, multiplied by 7.)

Item (B)—*Empty cars.*—Report total empty cars received from *all* connections during the month of October separated as to (1) *Cars for loading on your line:* (a) Those utilized for loading, (b) Returned as unsuitable; (2) *Bridged to connections;* (3) *Total empty cars received from connections;* and (4) *Weekly average.* (Total empty cars divided by 31 and multiplied by 7.)

Section V—*Empty cars developing on line.*—Report all cars made empty on line during the month of October, separated as to (1) Cars utilized for loading on your line; (2) Delivered to connections; (3) Total empties developing on line; and (4) Weekly average. (Total empty cars divided by 31 and multiplied by 7.)

Section VI—*Serviceable cars on line—Report all serviceable cars on line as of 12:01 a.m. October 1, 1964,* and 12:01 a.m., on November 1, 1964, excluding both heavy and light bad order cars, separated as follows:

(1) On reporting railroad's line;

(2) On short lines to which you furnish cars for loading; and

(3) Total (1) plus (2)

Section VII—*Car supply—serviceable revenue freight cars*

Item (A) *Car shortages—Report actual weekly shortage of serviceable cars for each of the 4 weeks ending October 31, 1964.* The total shortage for each week shall not exceed the number of additional cars which could have been loaded and handled in that week with an adequate car supply. Report for each working day (Monday through Friday) as shortage the aggregate number of cars specifically ordered placed for loading that day in excess of number actually furnished, including cars appropriated by shipper, providing such orders are and have been unfilled for 24 hours or more prior to 6 p.m. of the day for which the record is made. Exclude orders that are *inflated in excess of shipper's known ability to load and ship within 1 working day.*

No shortage exists regardless of number ordered and furnished when shipper fails to load all cars furnished of kind ordered.

At industries jointly served with other railroads no shortage exists regardless of number ordered and furnished when shipper secures the cars required for loading from another serving railroad.

If the shortage occurs in connection with cars ordered from a connection for return loading, report should be made only by the road that places the order; furthermore, no shortage should be reported if the railroad ordering such cars from another road is able to supply them from some other source.

Special types of cars ordered, which are not available, should not be shown as a shortage if other cars suitable for loading the freight are available.

Item (B) *Car surplus*

(1) The total number of empty serviceable revenue freight cars on hand at stations in excess of

orders for loading each day, after deducting number of cars normally required for next day's loading, should be counted as surplus. (In case local operating conditions at specific points require assembling in advance of loading of more than 1 day's supply of empty cars also should be deducted before reporting surplus.)

(2) The aggregate number of such surplus cars of each type on hand for the 5 days, Monday through Friday, divided by 5, for each of the 4 weeks ending October 31, shall be reported as the average daily surplus.

(3) Cars assembled for special or future loading, such as perishables, grain, auto, rough freight, et cetera, shall be included in report as surplus, with note stating the number and for what purpose cars are assembled, using additional page for explanation of unusual conditions.

Section VIII—Freight car ownership—October 1, 1964

Item (A) Total ownership.—Report, by type and mechanical designation requested, the total number of cars owned or leased by you on October 1, 1964, (exclude switching and terminal company ownership cars not normally used in interchange) together with (1) *System cars held for heavy repair*, (2) *System cars held for light repair*, (3) *System cars held for dismantling*, which are included in ownership and in (1). Report the number of (4) *System cars given heavy repair*, 12 months ending September 30, 1964.

Item (B) *Serviceable ownership.* — Report the number of serviceable cars in your ownership on October 1, 1964—Item (A) minus (A)(1) and (A)(2).

Item (C) *System cars in assigned or "Pool" service.*—Report the number of system cars assigned to industries, in assigned "pools" or boarded "Return to" assigned to stations or terminals, by type and mechanical designation requested.

(1) Number of *your* cars assigned to industries or terminals on your line.

(2) Number of *your* cars assigned to industries or terminals on connecting lines; and

(3) Number of *your* cars assigned to industries or terminals on foreign lines with which you do not connect.

Item (D) *Number of cars in "Integral" unit or volume service.*—Report in total the number of cars in such service, separated:

(a) Railroad owned or leased cars; and

(b) Shipper owned or leased cars; in traffic originating on your line.

Section IX—*Installation of cars—12 months ended October 1, 1964*

Item (A) *New cars purchased, leased or built in company shops.*

(1) *Total*

(a) *For assigned or pool service;* (b) *For "integral," volume or unit train service;* and (c) *For regular commercial service.*

Section X—*Cars retired—12 months ended October 1, 1964*

Report all cars retired by your railroad during the 12-month period ending October 1, 1964, separated (A) *For demolition or sale;* (B) *For rebuilding;* (C) *For reclassification;* (D) *Leased to others;* and (E) *Total cars retired.*

Section XI—*Estimated freight car ownership*

Estimate your freight car ownership as of October 1, 1965, separated the same as in section VIII(A); report items requested.

Section XII—*Estimated installation of cars—12 months ended October 1, 1965.*

Estimate the number of freight cars to be installed during the 12-month period ending October 1, 1965, separate the same as in section IX; report items requested.

Section XIII—*Estimated retirements of cars—12 months ended October 1, 1965.*

Report your estimate of the number of cars you will retire during the 12 months ending October 1, 1965, by types and total.

Returns for sections XIV through XVI shall be filed on or before June 1, 1965

CAR-DAYS ON LINE AND CAR-MILES GENERATED ON LINE

The purpose of these sections of the questionnaire is to obtain data on car-days and car-miles involved on each line in handling its traffic during the month of October 1964. Cars which originate in switching service on connecting lines and terminate on the reporting railroad should be considered as local traffic; cars originating on the reporting line in road-haul service for delivery in switching service on a connection should be counted as local traffic. All car-days and car-miles assignable to cars originating in switching service for line-haul movement shall be included in car-days and car-miles reported by the initial road-haul carrier.

All car-days and car-miles assignable to cars terminating in switching service after road haul shall be included in car-days and car-miles by the last road-haul carrier. In determining the allocation of car-days and car-miles between loaded and empty car-days and miles, the following will govern:

Each car handled in switching service shall be checked to ascertain the actual number of days involved in such service. Except in cases where an empty car was delivered at the junction for return loading in switch service or delivered loaded for switch delivery and returned empty, this plan would require obtaining records from the carrier performing the switching service. If a car were received empty by the switching carrier from another carrier at the particular station the record would cover time from date received until delivered loaded to the reporting carrier. If the car were released from loading in the terminal, the empty days would be computed covering time after release from inbound loading. If the car were moved empty in road haul by the carrier performing the switching, days assignable will be computed from the time of arrival at the terminal. Car-days for cars originating in switching service shall be reported by carrier billing the car for road haul and for cars terminating in switching service by the road retaining the billing.

Section XIV—*Car-days on line.*—Compute car-days accruing between October 1 and October 31, 1964, both inclusive.

Item (A)—*Cars loaded and terminated on line:*

(1) Loaded car-days will consist of all days during period cars were loaded or being loaded. Car-days will be computed from the first day of the re-

porting period October 1, 1964. Loaded car-days will be calculated from date of placement of car for loading to date car is released empty at destination as evidenced by the demurrage record.

(2) Empty car-days will be computed from first day of reporting period October 1, 1964 or from subsequent date of receipt from connection or release from prior load until date of placement for loading as evidenced by demurrage record. If, after release from local loading, car is delivered empty to another carrier, the car-days involved will be assigned to the last local move. If cars, after release, are utilized for loading, the empty car-days will be assigned to the next loaded move.

Item (B)—*Cars loaded and delivered to connections:*

(1) Loaded car-days will consist of all car-days during period on which cars were loaded or were being loaded. Loaded car-days will be calculated from date of placement of empty car for loading, as evidenced by demurrage record, until car is delivered to connection.

(2) Empty car-days will be computed from first day of reporting period October 1, 1964, or from subsequent date of receipt from connection or release from prior load until placement of empty car for loading as evidenced by demurrage record.

Item (C)—*Loaded cars received from connections:*

(1) *Terminating on line.*

(a) Loaded car-days will be calculated from date of receipt from connection until release of inbound load at destination as evidenced by demurrage record.

(b) Empty car-days will consist of those days from release of car at destination until delivered empty to

connection. If cars are subsequently loaded on line, empty car-days assignable shall be reported in section XIV, items (A) and (B).

(2) *Delivered to connections*

(a) Loaded car-days will be calculated from date of receipt from connection until date delivered to connection.

Item (D)—*Number of "No Day" cars handled.*—Report the total number of all cars (loaded and empty) received by your line after 12:01 a.m., bridged to connections and interchanged before 11:59 p.m., the same day. Report also estimated average hours per car such cars are on line. (Using separate statement, if needed, explain procedure used in arriving at estimated average hours per car.)

Item (E)—*Car-days on class II lines.*—Report car-days in total (both loaded and empty) on cars delivered to class II lines, which they load or terminate. (List on a separate statement, the names of each railroad and switching and terminal company; and the total number of car-days for the month of October.)

Item (F)—*Car-days—cars in intra-plant or inter-plant switching service:*

Report total car-days (both loaded and empty) for cars used in intra-plant or inter-plant service and where switching service is performed by your line or by the industry. (Report only car-days on cars, either railroad or privately owned, which are normally used in interchange service.)

Item (H)—*Car-days—empty cars received from connections:*

Referring to section IV, item (B), show the total empty car-days separated as to (1) cars for loading

on line (a) those cars utilized for loading; (b) returned as unsuitable for loading; (2) empty cars delivered to dependent short lines; and (3) bridged to connections.

Item (I)—*Car-days—cars awaiting repairs:*

Show total number of cars and days from date carded for repairs until date released for return to revenue service. Report will include all such days accruing during period October 1-October 31, 1964, inclusive, separated:

(1) Car-days held for light repair

(a) Number of cars

(2) Car-days held for heavy repair

(a) Number of cars.

Item (J)—Car-days—surplus cars:

Using surplus cars reported in section VII, item (B) as to surplus cars, estimate the number of car-days for the period October 1-October 31, 1964, inclusive, represented by surplus cars.

Item (K) For the cars reported in section I, item (D), report the number of days from the time they were spotted for loading until released by the shipper.

Item (L) Report the total number of days for which demurrage was incurred by the cars reported in section I, item (D) regardless of the method used for settlement.

Item (M): For the cars reported in section III, item (A) plus section IV, item (A), (1) report the number of days from the time they were spotted for unloading until released by the consignee.

Item (N) Report the total number of days for which demurrage was incurred by the cars reported

in section III, item (A) plus section IV, item (A), (1) regardless of the method used for settlement.

Item (O)—Reclaims paid and received, month of October 1964:

(1) Switching reclaims paid showing (a) total number of cars, and (b) total number of days.

(2) Switching reclaims received showing (a) total number of cars, and (b) total number of days.

(3) Per Diem Rule 22 reclaims paid showing (a) total number of cars and (b) total number of days.

(4) Per Diem Rule 22 reclaims received showing (a) total number of cars, and (b) total number of days.

(5) Rule 6, appendix B, Per Diem Code, reclaims paid (or allowed) showing (a) total number of cars, and (b) total number of days.

(6) Rule 6, appendix B, Per Diem Code, reclaims received (or allowed) showing (a) total number of cars, and (b) total number of days.

(7) Other reclaims paid (not covered by 1, 3, or 5 above) showing (a) total number of cars, and (b) total number of days.

(8) Other reclaims received (not covered by 2, 4, or 6 above) showing (a) total number of cars, and (b) total number of days.

(9) Total reclaims paid (sum of 1, 3, 5, and 7) showing (a) total number of cars, and (b) total number of days.

(10) Total reclaims received (sum of 2, 4, 6, and 8) showing (a) total number of cars, and (b) total number of days.

Note: Indicate briefly on a separate statement an explanation of the reclaims covered by items 7 and 8 above.

Item (P)—*Turnaround time:*

(1) Turnaround time on system cars in assigned service: Report the average turnaround time in days for system cars in assigned or "Pool" service, separated (a) Cars assigned in local traffic; and (b) cars assigned in interline traffic.

(2) Cars in local service: Referring to item (A) this section, (Cars loaded and terminated on line) report the average turnaround time in days based upon a tracing of a sample of the cars.

Section XV—Car-days off line-system cars

Report, in total, the number of days system cars (owned or leased) were off line during the month of October 1964.

Section XVI—*Car-miles generated on line*

Car-miles to be shown in each column are to be computed on the same basis as car-days explained in section XIV.

APPENDIX B

Recommended code of car service rules

(Bureau of Operations, Interstate Commerce Commission)

DEFINITIONS

Home car—A car on the road to which it belongs.

Foreign car—A car on a road to which it does not belong.

Private car—A car having other than railroad ownership.

Home—A location where a car is in the hands of its owner.

Home road—The road which owns a car, or upon which the home of a private car is located.
Home junction—A junction with the home road.

RULE 1

Home cars shall not be used for the movement of traffic beyond the limits of the home road when the use of other suitable cars under these rules is practicable.

RULE 2

Foreign cars, empty at a junction with the home road must be:

(a) Loaded at that junction to or via home rails, or,
(b) Delivered empty at that junction to home road, except in instances where rule 6 has been invoked, or unless otherwise agreed by roads involved.

RULE 3

Foreign empty cars other than those covered in rule 2, shall be:

(a) Loaded to or via owner's rails.
(b) Loaded to a destination closer to owner's rails than is the loading station or delivered empty to a short-line or switch-loading road for such loading.
(c) Delivered empty to the home road at any junction unless subject to rule 6.
(d) Delivered empty to the road from which originally received under load, at the junction where received, EXCEPT that, when handled in road-haul service, cars of direct connection ownership may not be delivered empty to a road which does not have a direct connection with the car owner.

(e) Returned empty to the delivery road when handled only in switching service.

NOTE: Boxcars covered by Association of American Railroads' Special Car Order No. 90, shall be handled as provided therein.

NOTES TO CAR SERVICE RULES 1, 2, AND 3

(A) Car Service rules 1, 2, and 3 do not apply at reconsigning points to cars reconsigned with original lading under duly filed and published tariffs.

(B) 1. "Junction" as used in these rules means stations where roads interchange cars at a common point or within switching limits over their own lines, or an intermediate line or lines, or a car ferry or float within such limits. Roads so interchanging cars shall be considered direct connections.

2. This information shall be published in THE OFFICIAL RAILWAY EQUIPMENT REGISTER, and when the interchange is other than over their own rails, the channel through which the interchange is effected must be shown.

(C) Exceptions to these rules may be authorized by the Car Service Division, Association of American Railroads, subject to approval of the Interstate Commerce Commission. Requests for exceptions must be in writing and must contain a full statement of the need for the exceptions. When approved by the Commission such exceptions shall be published in this tariff.

RULE 4

Acceptance from shipper of cars loaded in violation of rules 2 or 3 herein is prohibited.

RULE 5

Empty cars may be short-routed at a reciprocal rate of eight cents (8¢) per mile plus switching charges, with a minimum of one hundred (100) miles for each road handling the car, the road requesting the service to pay the charges.

NOTE A: The reciprocal rate of eight cents (8¢) per mile named herein shall be in lieu of all other tariff charges for line-haul movements.

NOTE B: The term "switching charges" is defined as charges assessed under applicable tariffs by a railroad which does not perform any line haul in the process of a short-route movement.

NOTE C: The loading or use of a car being handled under rule 5 shall nullify [redacted] application of this rule for all or any portion of [redacted] ment.

RULE 6

If a movement of traffic requires return of empty cars to home road via the junction at which cars were delivered in interchange under load, the home road may demand return of empty cars at such junction, except that cars offered a home road for repairs must be accepted by owners at any junction point.

NOTE TO RULE 6: Notice of an intent on the part of any road to invoke the provisions of this rule should be issued by the designated transportation officer to the designated transportation officer of the road to which the notice is addressed, such notice to specify the type of cars and particular junction points involved.

Such notice may not limit acceptance to the individual cars previously delivered, but may require the return of and equivalent number of home cars of the type specified, at junction point where delivered loaded.

INTERPRETATIONS

1. The words "Movement of Traffic" in Car Service rule 6 means the movement regularly through any junction point of any kind of traffic in (or on) the same class of car.

2. Car Service rule 6 gives to a railroad which may deliver regularly, to a connection through any junction, traffic of any kind in (or on) its cars of the same class, the right to require the connection participating in the handling of traffic from the junction point, to use that point of interchange for the return of the class of empty cars engaged in the service, instead of returning them at some other junction less favorable to the receiving (owning) railroad.

RULE 7

(A) Cars shall be considered as having been delivered to a connecting railroad when placed upon the track agreed upon and designated as the interchange track for such deliveries, accompanied or preceded by necessary data for forwarding and to insure delivery, and accepted by the car inspector of the receiving road.

Notwithstanding the foregoing paragraph, the receiving road shall be responsible for the cars, contents and per diem after receipt of the proper data (1) for forwarding and to insure delivery. This responsibility shall continue as respects cars rejected by the car inspector of the receiving road until such cars have been returned to the delivering road. The effect of this paragraph may be altered by special arrangements made between the roads concerned.

(1) Note.—The character of the necessary data will be determined by each receiving road in accordance with the conditions of its service.

(B) (1) Each railroad will interchange within 24 hours after arrival, or release at interchange station, all cars which it properly may interchange in accordance with the provisions of section A of this rule, subject to the following exceptions (2) to (5), inclusive:

(2) Cars covered by an embargo.

(3) Cars covered by written or telegraphic notice given by the intended receiving line stating that it is unable to receive.

(4) Cars which cannot be placed physically upon the designated interchange track.

(5) Cars which cannot be interchanged because the delivering line does not have daily train or switching service at the interchange station. All such cars must be delivered or offered for delivery during the next date and hour any train or switching service becomes available.

(C) When interchange required by section B, paragraph (1) of the rule cannot be accomplished, the railroad holding the cars must notify the line unable to receive, the initials, number, consignee and lading of each car held. Such notices must be made in writing or by telegraph, or verbally, confirmed in writing within 24 hours, exclusive of Saturdays, Sundays, and holidays. In addition, when cars cannot be interchanged because of inability to place upon the designated interchange track, a list will be furnished by the offering line to the intended receiving line, showing by initial and number, all cars standing on the interchange track which prevents its use for the interchange of additional cars. The date and hour of attempted interchange must also be shown on this list.

(D) (1) The line withholding cars from interchange must reclaim against the line unable to receive for all per diem, from date offered to date of actual delivery,

earned by each car held because of the conditions described in section B, paragraphs (3) and (4) of this rule. Such reclaims must be accompanied or preceded by the offering report and by the list, when applicable, required by paragraph C of this rule.

(2) The line unable to receive cars withheld from interchange under the provisions of section B, paragraphs (3) and (4) of the rule, will accept and pay, without free time allowance, reclaims prepared under paragraph (1) of the section.

(3) Reclaims prepared under this rule must be presented within 30 days of the month in which the cars held were finally delivered.

(E) On cars held off interchange tracks because of conditions attributable to the consignee, constructive placement notices will be issued and demurrage assessed as follows:

(1) By the line holding cars held subject to section B, paragraph 2 of this rule.

(2) By the line unable to receive cars subject to section B paragraphs (3) or (4) of this rule, when its inability to receive is the direct result of a disability of the consignee which prevents delivery or placement of the cars on the tracks normally used by or for the consignee for purposes of loading, unloading or holding of cars for orders or for inspection.

RULE 8

Each railroad shall become party to Agent H. R. Hinsch's Freight Tariff 4-G, I.C.C. H-17, Car Demurrage Rules and Charges—Storage Rules and Charges, or successive issues thereof. Except as otherwise provided herein, Freight Tariff 4-G shall contain all rules, regulations and charges governing the detention of cars or the storage of freight on railroad property, by

or on behalf of shippers and receivers. Other tariffs of demurrage and storage rules, regulations and charges may be published for application to specific traffic, provided an item of exception naming such tariffs is published in Freight Tariff 4-G.

RULE 9

Cars containing refuse must not be offered in interchange as empty cars.

RULE 10

(A) Boxcars classed as suitable for grain loading or better, or refrigerator cars, must not be loaded with any of the contaminating commodities listed below. If so loaded and it becomes necessary to renew floors, lining, or sheathing (including associated parts), or portions thereof, in order to restore car to previous loading classification because of contamination due to such loading, the cost of the repairs shall be assumed by the road (either switching or road-haul) responsible for furnishing the car for such loading.

1. Animal products:

(a) Hides, Pelts, or Skins.
(b) Glue Stock.
(c) Manure, or Fertilizing Compounds with Contaminating Odor.
(d) Meat Refuse, Offal, Tankage, or Waste from Slaughtered Animals.
(e) Bones, or Horns with Contaminating Odor.
(f) Dried blood.
(g) Tallow.

2. Copra.
3. Fish Scrap or Fish Meal.

4. Shell Fish in Bulk.

5. Shells (clam, mussel, or oyster) in raw state with contaminating odor.

6. Asphalt (asphaltum) Natural, or Asphalt Compounds, byproduct or petroleum.

7. Creosote, or Creosoted Materials.

8. Lamp Black, Carbon Black (all types), Graphite (Black Lead), or Plumbago.

9. Poisonous Chemicals or Compounds in containers or bulk.

(B) The following commodities must not be loaded in foreign boxcars classed as suitable for grain loading or better, or refrigerator cars, except that such cars of any road participating in the haul may be used when such usage is authorized by the owner.

1. Battery parts such as cylinders, frames or plates, burned out of scrap.

2. Charcoal, in bulk or cloth bags.

3. Coal, coke, lignite or briquettes.

4. Containers, empty, such as barrels, cans, drums or pails when previous use was for acids, asphalt, chemicals, creosote, grease, oils, tar, tankage and similar contaminating commodities, unless properly cleaned inside and outside to prevent contamination.

5. Cotton or other seeds, hulls, fibre or shavings, when oily dyed, in bulk or in containers which would result in contamination.

6. Glass, crushed, ground or powdered, in containers or in bulk.

7. Graphite in containers, which would result in contamination.

8. Greasy or oily products in bulk or in containers which would result in contamination, such as:

(a) Metal borings and turnings.

(b) Bearings.

(c) Chains.
(d) Electrical apparatus.
(e) Iron or steel bars, plates or shapes.
(f) Machine parts.
(g) Machinery.
(h) Pipe and pipe fittings.
(i) Scrap.
(j) Tin plate (oiled).
(k) Vehicle parts, including farm implements and tractors.

9. Insecticides, fungicides, insect repellents, vermin exterminators, poisonous, in containers or bulk.
10. Peat, or peat moss in bulk.
11. Tar and tar products in barrels, and tar refuse.
12. Acids.
13. Grease.
14. Molasses.
15. Oils.
16. Petroleum or petroleum products, including compounded oils or greases having petroleum base.

RULE 11

Waiver or reclaim of per diem, mileage or other car rental charges for empty cars en route to, or held en route to, or held empty at points of loading is prohibited.

RULE 12

Item 1: Requests for cars for loading, instructions for release of cars held for orders, including orders for actual placement, and instructions for holding of cars shall be in writing, or confirmed in writing within 24 hours, such confirmation to include actual date and time orders or instructions were given, name of

party requesting the service and name of party accepting the request on behalf of the road.

Item 2: Orders for equipment for loading must be specific and must state:

a. Kind and size of cars wanted.
b. Number of cars wanted.
c. Date wanted (See Note 1 below).
d. Commodity to be loaded.
e. Destination and routes.

Note 1: If order covers more than one date it must state number of cars wanted separately for each day.

Item 3: Shippers must place orders for equipment desired for loading with the road on which the cars are to be loaded.

Item 4: On cars originating in switching service, the road performing the switching service shall, if cars of suitable ownership under these rules are immediately available, furnish cars for loading for road-haul via another carrier. If such cars are not immediately available, the switching carrier shall immediately order suitable cars from the designated road-haul carrier in the manner required by paragraph 2. Cars ordered by switching carriers from road-haul carriers for return carrier loading road-haul service will be furnished by road-haul carriers in the same manner and to the same extent as cars ordered by industries directly served by it.

Item 5: Switching carriers are obligated to furnish or arrange for cars required for loading to destinations within the same switching limits.

Item 6: A switching carrier must not load its own equipment in switch service for road-haul by other carriers when suitable equipment, under these rules, is immediately available on its line or can be furnished promptly by road-haul carrier.

Item 7: Road-haul carriers, in furnishing cars on order placed by switching lines, are responsible for observing Car Service rules. Switching carriers must so apply cars received on empty car orders as to insure compliance with Car Service rules.

RULE 13

Specific cars may be assigned to shippers, for their exclusive use, subject to the following conditions:

a. Shipper must request assignment of a specific number of cars in writing at least 10 days before their intended use.

b. Assigned cars will be subject to demurrage rules applicable to cars held for loading from date of actual or constructive placement until released. If released without loading, demurrage rules applicable to cars ordered, furnished, and not used will apply.

c. Assigned cars held empty en route to loading points, on instructions of assignee, will be subject to demurrage rules applicable to cars held for orders.

d. Assigned cars are exempt from Car Service rule 1, 2, and 3.

e. Assigned cars shall not be held empty en route to loading point except as follows:

1. Upon written instruction of assignee.

2. When assignee cannot immediately accept on arrival at loading point and cars cannot reasonably be held on other tracks at loading points.

3. For necessary repairs (Not cleaning).

f. Within 24 hours of arrival at loading, or at hold points as described in items (e) (1) and (e) (2) of this rule, exclusive of days exempted from demurrage in applicable demurrage tariffs, carriers will place or constructively place empty assigned cars, or

issue notice of arrival on assigned empty cars held en route for orders.

RULE 14

Loaded cars will not be held at any point between origin and destination except as follows:

a. To perform any service specifically authorized by applicable tariffs.

b. To make necessary repairs to cars, including adjustment of lading.

c. To obtain necessary authority for movement of car, or to obtain authority for transfer or rearrangement of lading, when loaded to dimensions or weights in excess of those published in Railway Line Clearances.

d. When consignee is unable to accept immediately upon arrival and cannot reasonably be held at destination. (See Note.)

e. Cars loaded in violation of an embargo. (See Note.)

f. When normal route of movement is blocked because of accident, high water, damage to track or other disability of this railroad.

NOTE: When cars are held under Items (d) or (e) of Car Service rule 14, notice will be given within 24 hours, in the manner prescribed in applicable demurrage tariffs.

RULE 15

The acceptance of instructions requiring the movement of freight via specific internal routes of a single railroad is prohibited except where necessary to accomplish services specifically authorized by applicable tariffs. When such services are instructed by shipper or consignee the originally applicable tariff charges must be assessed regardless of subsequent cancellation.

RULE 16

Item I. Each railroad will undertake to:

(1) *Placing of cars.* — (i) Loaded cars, which after placement will be subject to demurrage rules applicable to detention of cars awaiting unloading, shall be actually placed within 24 hours, exclusive of Sundays and holidays, following arrival at destination.

(ii) Actual placement means placing of a car on industrial interchange tracks or other-than-public delivery tracks serving the consignee, or on public delivery tracks. Proper notice for cars placed on public delivery tracks shall be sent or given within 24 hours after placement, exclusive of Saturdays, Sundays, and holidays.

(iii) When delivery of a car, either empty or loaded consigned or ordered to an industrial interchange track or to other than a public delivery track cannot be made because of any condition attributable to the consignor or consignee, such car will be held at destination or, if it cannot reasonably be accommodated there, at an available hold point, and constructive placement notice shall be sent or given the consignor or consignee within 24 hours, exclusive of Saturdays, Sundays, and holidays, after arrival of car at destination or hold point.

(iv) Loaded cars held at destination for accessorial terminal services described in the applicable tariffs, such as holding for orders or inspection, shall be placed on unloading, hold or inspection tracks, and proper notice given within 24 hours, exclusive of Saturdays, Sundays, and holidays, after arrival at destination. On cars set off and held short of billed destination, or on cars held at destination and short of inspection tracks, a written notice shall be sent

or given to consignee or other party entitled to receive such notice, within 24 hours of arrival, exclusive of Saturdays, Sundays, and holidays, at the hold point. Time and charges shall be computed from the first 7 a.m., following such notice and demurrage assessed in accordance with provisions of applicable tariffs.

(2) *Removal of cars.*—(1) Empty cars must be removed from point of unloading or interchange tracks of industrial plants within 24 hours, exclusive of Sundays and holidays, following unloading or release by consignee or shipper, unless such empty cars are ordered or appropriated by the shipper with approval of carrier for reloading within such 24-hour period. Empty cars not ordered for loading at point where made empty must be forwarded in line-haul service within 24 hours, following removal of empty cars.

(ii) Outbound loaded freight cars must be removed from point of loading or interchange tracks of industrial plants within 24 hours, exclusive of Sundays and holidays, following acceptance by carrier of the shipping instructions covering the cars. Such cars must be forwarded in line-haul service within 24 hours, following release and removal.

(iii) Cars subject to paragraphs (2) (i) and (2) (ii) not made accessible to the carrier shall be subject to demurrage until such time as they become, and remain, accessible to the carrier.

(3) *Forwarding of cars.*—(i) Loaded and empty cars of foreign or private ownership, and empty system freight cars when the holding line is the beneficiary of Car Distribution Directions or Orders issued by the Interstate Commerce Commission applicable to the kind of car held, shall not be held in excess of 24 hours for any purpose, except as follows:

(ii) Loaded cars held subject to instructions of consignee, consignor, or other qualified owner of the freight contained therein.

(iii) Cars held for repairs.

(iv) Cars held because daily train or switch engine service is not available. (See paragraph 6.)

(4) *Cars held for repairs.*—(i) Loaded cars and empty cars of foreign or private ownership, and empty system cars when the holding line is the beneficiary of Car Distribution Directions or Orders issued by the Interstate Commerce Commission applicable to the kind of car held, which are held for light repairs shall be placed on repair tracks not later than the first 7 a.m. exclusive of Sundays and holidays after time carded for repairs. Light repairs shall be made on same calendar day, exclusive of Sundays and holidays, that cars are placed on repair tracks; except that when necessary to order from car owner the material necessary to make light repairs to foreign or private cars, light repairs to foreign or private cars held awaiting such material shall be completed prior to 11:59 p.m., of the calendar day which includes the first 7 a.m., inclusive of Sundays and holidays, after receipt of such material at the station at which the repair point is located.

(ii) Light repairs are defined as repairs requiring less than 20 man-hours by repair track forces to complete.

(5) *Railroad operating regulations for the movements of freight cars.*—(i) No common carrier by railroad subject to the Interstate Commerce Act shall delay the movement of cars by holding such cars in yards, terminals, or sidings for the purpose of increasing the time in transit of such loaded cars.

(ii) Cars shall not be set out between terminals except in cases of emergencies or sound operating practices.

(iii) Backhauling cars for the purpose of increasing the time in transit is prohibited.

(iv) Through cars shall not be handled on local or way freight trains for the purpose of increasing the time in transit of such cars.

(v) The use by any common carrier by railroad for the movement of cars over its line, of any route other than its usual and customary fast freight route from point of receipt of the car from consignor, or connecting line, to point of delivery to consignee, or to next connecting line, except for the purpose of according a lawfully established transit privilege (not including a diversion or reconsignment privilege) is hereby prohibited.

(6) *Availability of service.*—(i) The availability for movement of forty (40) or more cars, whether loaded or empty, in territory normally served by a single train or engine, shall be considered sufficient to justify the train or engine service required to place, remove, or forward all such cars on any given day. Where side-trip operations are necessary, the availability of 10 such cars for each 25 miles of round-trip service required to move such cars will be considered sufficient to warrant the side-trip.

(ii) When the volume of available traffic is less than that described in paragraph (i) of this section, placement, removal, or forwarding of all cars which are available 1 hour or more prior to departure of a train or engine serving the station or terminal where such cars are held, by that train shall be deemed compliance with item I, sections (1), (2), or (3) of this rule. Nothing in this paragraph shall be interpreted as to require the movement of a car in a direction opposite to its proper direction of movement, unless such backhaul will expedite the overall movement of the car to its proper destination.

(7) *Application.*—Holidays shall be those listed in item 25 of Agent H. R. Hinsch's tariff ICC H-17, naming Car Demurrage Rules and Charges, supplements thereto or successive issues thereof.

Item H. (a) Each railroad will, with due regard for efficient railroad operating practices, hold no more cars for prospective loading at any time for any industry which it serves than those needed to protect current outbound loading, and where one or more other railroads also serve an industry each railroad will arrange to prevent the aggregate holding of empty cars in excess of the industry's current needs.

(b) The holding of empty foreign cars for prospective loading in excess of 24 hours, exclusive of Saturdays, Sundays, and holidays is prohibited. (See Exception.)

EXCEPTION: Cars assembled for peak or seasonal movements and special types of cars for specific types of loading provided advance authority is received in writing from the Car Service Division, Association of American Railroads and subject to approval of the Interstate Commerce Commission.

APPENDIX C

Regulatory proposals

(Bureau of Operations, Interstate Commerce Commission)

PROPOSAL I

The proposed rules shall be applicable to all common carriers by railroad subject to the Interstate Commerce Act, regardless of classification, and shall apply to intrastate, interstate, and foreign commerce.

PROPOSAL II

A Code of Car Service Rules to be filed in tariff form to which all carriers described above shall be parties. Additional rules presently published by the Association of American Railroads in its Code of Car Service Rules may be incorporated in these rules or may be separately published, at the option of the carriers. Proposed Car Service Rules 5, 6, 9, and 10 appear in the existing AAR Code of Car Service Rules. Their continuance should be optional with the carriers. However, if these rules are continued, they should be enforceable and have uniform application to all railroads, hence their inclusion in the proposed Car Service Rules. The suggested rules are printed as appendix F herein.

PROPOSAL III

Carriers will maintain at open stations and at yards and terminals daily records, on forms approved by the Interstate Commerce Commission, of cars on hand, cars ordered for loading, cars furnished for loading, cars received and dispatched and of cars held for repairs.

PROPOSAL IV

Carriers will maintain at open stations, on forms approved by the Interstate Commerce Commission, records of cars held by or for patrons, on which demurrage, track storage and other charges provided in demurrage tariffs are based.

PROPOSAL V

All rules, regulations and charges governing the holding of cars or storage of freight on railroad property by or on behalf of shippers, including track

storage charges, shall be published in separate tariffs relating exclusively to such rules, regulations, and charges.

PROPOSAL VI—DEMURRAGE RULES

1. The demurrage rates named in Agent H. R. Hinsch's Tariff 4-G, I.C.C. H-17, supplements thereto, or successive issues thereof shall be the minimum demurrage rates published in any tariff.

2. Nothing in these regulations shall prohibit the publication of higher demurrage rates if such rates are deemed necessary to encourage the prompt release of freight cars.

3. All demurrage rates and charges shall be based on the detention of cars. Demurrage rates and charges presently expressed in monetary units per unit of weight, per bushel, et cetera, shall be canceled and replaced with rates and charges based on the detention of cars for stated periods of time.

4. Except as to traffic presently governed by Agent H. R. Hinsch's Tariff 8-M, I.C.C. No. H-13, supplements thereto or successive issues thereof, no demurrage tariff shall permit the holding of cars free of demurrage for periods in excess of 5 days, exclusive of Saturdays, Sundays, and designated holidays.

5. Nothing in these regulations shall be deemed to require the granting of 5 days' time free of demurrage nor to require the exemption of Saturdays, Sundays, and holidays from demurrage charges.

6. All demurrage tariffs, except Agent H. R. Hinsch's Tariff 8-M, I.C.C. H-13, shall provide for arbitrary demurrage charges after the time periods and at rates equal to or greater than the rates specified in agent H. R. Hinsch's Tariff 4-G, I.C.C. No. H-17.

7. Section C, rule 4, item 255 of Agent H. R. Hinsch's Tariff 8-M shall be amended to terminate free time period after 30 days, Saturdays, Sundays, and holidays included, and to establish arbitrary demurrage rates equal to the highest rate applicable to cars of the same mechanical designation, published in Agent H. R. Hinsch's Freight Tariff 4-G.

8. Except as provided in paragraphs A, B, and C below, Agent H. R. Hinsch's Freight Tariff 4 Series will govern the assessment of all demurrage charges:

A. All other tariffs establishing demurrage rules, regulations and charges will be described in an item or list of exceptions published in Agent H. R. Hinsch's Freight Tariff 4 Series.

B. Other demurrage tariffs may be issued naming greater or lesser periods of free time, or higher rates of demurrage charges than those named in H. R. Hinsch's Tariff 4 Series. When such other demurrage tariffs are issued they will also contain appropriate revisions of Average Agreement Rules. In all other respects the provision of Agent H. R. Hinsch's 4-Series tariff will govern.

C. The present tariff governing coal at the mines, H. R. Hinsch's Tariff 8 Series, may be continued subject to the provisions described in preceding paragraphs.

9. Demurrage at ports shall be subject to the following:

A. Demurrage rules, regulations and charges shall be uniformly applicable at ocean, lake, and river ports and shall apply to both export and domestic traffic, including intercoastal traffic.

B. A maximum of 48 hours free time may be allowed on cars originating in inter- or intraterminal

services at the port where held and destined to vessels, piers, or storage yard for unloading. Such free time shall be computed without notice from the first 7 a.m., after loading is completed and switching instructions are given, less time required for movement. Saturdays, Sundays, and holidays may be excluded in computing free time to the extent authorized by applicable tariffs.

C. When cars are held away from ports because of congestion at ports, or on instructions of consignee, consignor or owner of the freight, or are held for inspection, export papers, or any other services, either en route or at the ports, the free time allowed for such purposes will be included in the free time period allowed under applicable port demurrage tariffs.

D. In computing demurrage on cars subject to port demurrage tariffs, cars to be unloaded by the railroad under applicable tariffs, shall be released as of date and time the vessel named to transport the freight from the port arrives and is available for loading, or when instructions to unload and place in pier, shed, or ground storage, subject to applicable tariff charges, are received by the railroad, whichever occurs first.

E. When cars are unloaded by any other party they shall not be released until all freight is removed and the empty cars are made accessible to the carrier for removal from the unloading facilities.

F. Except as otherwise specifically authorized by the Interstate Commerce Commission, 24 hours free time, computed without notice from the first 7 a.m. after loading is completed, will be allowed on each car received from vessel for furnishing of forwarding instructions, including instructions for movements to other tracks, industries or stations within the port area.

10. When more than one demurrage tariff is effective at the same time at any station, separate average demurrage agreement accounts must be maintained for traffic subject to each applicable demurrage tariff.

PROPOSAL VII

Minimum quantity and Car Service Rules in Freight Tariffs

A. Except as otherwise provided in paragraphs (1) and (2), no carrier shall publish or participate as an origin carrier in any freight rates unless it owns, leases or otherwise controls sufficient equipment, of the kind required by its tariff provisions, to be used to transport the traffic anticipated.

1. This rule shall not apply to rates requiring that shippers or consignees furnish the cars to be used.

2. This rule shall not apply to class II or to switching and Terminal companies to the extent that their class I connections furnish evidence of their ability and consent to furnish the cars required.

B. Car ownership requirements shall be separately computed for general service and for special service freight cars.

C. General Service cars

1. General Service Cars are defined as cars which are suitable for loading with general commodities, either in packages or in bulk, and which, after unloading, may be reloaded without restrictions other than those contained in Car Service Rules 1, 2, or 3.

2. In computing ownership requirements of general service freight cars, the following shall be considered.

a. Kind of car required, including interior platform dimensions, cubic capacity, weight carrying capacity, load restraining devices, load cushioning devices, and door openings.

b. Loading characteristics of the freight, including density, whether in bulk or in packages, kind, size and shape of packages, or of freight.

c. Adequacy of present ownership of cars of the same kind, as measured by the freight car ownership formula established by the Interstate Commerce Commission.

d. The effect on the adequacy of the existing freight car ownership to handle present traffic that will result from the new or modified tariff requirements.

e. Orders for cars for the purpose of correcting existing deficiencies in car ownership, or for providing cars needed to meet the requirements of new or revised tariff provisions, or both.

D. Special Service Freight Cars

1. Special Service Freight Cars are defined as freight cars which are restricted in their use by one or more of the following:

a. By physical design.

b. By assignment to specific shippers.

c. By prohibition against reloading in general service, subject only to the provisions of Car Service Rules 1, 2, or 3. Such prohibitions may be:

1. Instructions of the owner.

2. Orders, other than temporary or emergency orders of either the Car Service Division, Association of American Railroads, or of the Interstate Commerce Commission.

2. In computing ownership requirements of Special Service Freight cars the following will be considered:

a. Availability of existing cars of the same kind by transfer from other movements.

b. Estimated turn-around time, based on consecutive loading dates.

c. Orders for cars of the same type for the purpose of correcting existing ownership deficiencies, of providing cars needed to meet the requirements of the new or revised tariff provisions, or both.

PROPOSAL VIII

When tariff provisions require the unloading of carload freight by carriers, and when the number of cars on hand to be unloaded exceeds the number that can be unloaded within the next 48 hours, exclusive of Saturdays, Sundays, and holidays named in Agent H. R. Hinsch's Freight Tariff 4-Series, the carrier performing the unloading will immediately place an embargo against additional shipments requiring unloading by it at the point involved. Embargoes placed under this proposal shall not be canceled until the number of cars to be unloaded is less than the number that can be unloaded during the next 24-hour period and provided that none of the cars awaiting unloading has been held for unloading in excess of 24 hours, commencing with the first 7 a.m., exclusive of Saturdays, Sundays, and holidays, of the date prior to the cancellation of the embargo.

In computing the number of cars that can be unloaded in a 24-hour period, the total number of cars unloaded during the immediately preceding 4-week period shall be divided by the total number of days on which any cars were unloaded during the period.

Carriers will maintain a current daily record of the average rate of unloading during the immediately preceding 4-week period and of the number of cars available, including those held for unloading and those in process of unloading.

PROPOSAL IX

Report to the Interstate Commerce Commission not later than the 10th day of each month the following data pertaining to assigned cars for the previous calendar month:

1. Reporting carrier
2. Cars assigned

a. Shipper
b. Station
c. Commodity
d. Number of cars assigned
e. Name of carrier furnishing the cars
f. AAR mechanical designation
g. Length
h. Net increase or decrease in assignment since last reporting date.
i. Number of loads originated by cars in the assignment since last reporting date.
j. Number of cars in assignment idle for repairs on reporting date.
k. Number of cars in assignment idle for modification on reporting date.

PROPOSAL X

Report to the Interstate Commerce Commission as of the 7th, 14th, 21st, and last day of each month the following data by kinds of cars listed:

1. Cars

Plain boxcars with inside length less than 44'8" and with doors less than 8'.

Plain boxcars with inside length less than 44'8" and with doors 8' and wider.

Plain boxcars with inside length 44'8" and over.

All Equipped boxcars.

Covered Hopper Cars.

All Refrigerator Cars.

All Open Hopper Cars.

All Plain Gondolas.

All Equipped Gondolas.

All Plain flat cars less than 151,000 pounds capacity.

All Flat cars equipped for handling highway trailers or containers.

All multi-level flat cars.

All other flat cars.

All Tank Cars.

All other cars.

2. Reports to Include

a. Ownership

i. total

ii. out of service for light repairs

iii. out of service for heavy repairs including cars held for retirement or dismantling

iv. serviceable ownership

v. retired since last report

vi. installed since last report

vii. on order

b. Cars loaded since last report

i. revenue freight

ii. company material

iii. total

iv. loaded cars received from connections

c. Cars on line

i. System
ii. Foreign
iii. Private
iv. Total

d. Average Daily Shortage for period
e. Average daily surplus for period

APPENDIX D

CODE OF CAR SERVICE RULES

Rule 1 Foreign cars, empty at a junction with the home road, must be:

(a) Loaded at that junction to or via home rails, or

(b) Delivered empty at that junction to home road, except in instances where Rule 6 has been invoked, or unless otherwise agreed by roads involved.

Rule 2 Foreign empty cars other than those covered in Rule 1 shall be:

(a) Loaded to or via owner's rails.

(b) Loaded to a destination closer to owner's rails than is the loading station or delivered empty to a short line or switch loading road for such loading. (Car Selection Chart is designed to aid in so selecting cars for loading.)

(c) Delivered empty to the home road at any junction subject to Rule 6.

(d) Delivered empty to the road from which originally received under load, at the junction where received, EXCEPT that when handled in road-haul service, cars of direct connection ownership may not be delivered empty to a road which does not have a direct connection with the car owner.

(e) Returned empty to the delivering road when handled only in switching service.

Note.—Box cars covered by Car Service Division Special Car Order No. 90 should be handled as provided therein.

Notes to car service rules 1 and 2.—

(A) 1. "Junction" as used in these rules means stations where roads interchange cars at a common point or within switching limits over their own lines, or an intermediate line or lines, or a car ferry or float within such limits. Roads so interchanging cars shall be considered direct connections.

2. This information should be published in THE OFFICIAL RAILWAY EQUIPMENT REGISTER, and when the interchange is other than over their own rails, the channel through which the interchange is effected must be shown.

(B) Inequities resulting from these rules should be resolved by negotiations between the roads involved, and exception to the rules is permitted following such resolvement and concurrence by the Car Service Division.

Rule 3 Each originating carrier must use reasonable diligence to see that foreign cars are loaded or handled in accordance with provisions of Car Service Rules.

Rule 4 Cars of railway ownership must not be delivered to a steamship, ferry or barge line for transportation by water, except for transportation in interstate commerce by common carriers by water between points within the continental United States (not including Alaska), without permission of the owner filed with the Car Service Division.

Rule 5 Empty cars may be short-routed at a reciprocal rate of eight cents (8¢) per mile plus switching charges, with a minimum of one hundred (100) miles for each road handling the car, the road

requesting the service to pay the charges and per diem or mileage allowance costs accruing to the handling line or lines.

Note A.—"Empty cars, when short-routed in accordance with car service rules, should be moved on empty car waybill, the road arranging for the service to pay the charges through bill and voucher plan. Under no circumstances should revenue waybill be issued with charges for such movement". (A.A.R. Accounting Division Rule).

Note B.—The term "switching charges" is defined as charges assessed under applicable tariffs by a railroad which does not perform any line haul in the process of a short route movement.

Question.—Does the loading or use of a car being handled under Rule 5 nullify the right of road performing the service to collect for all or any portion of the service rendered?

Answer.—Yes. (October 1, 1925).

Rule 6 If a movement of traffic requires return of empty cars to home road via the junction at which cars were delivered in interchange under load, the home road may demand return of empty cars at such junction, except that cars offered a home road for repairs, in accordance with the Interchange Rules of the Mechanical Division, must be accepted by owners at any junction point.

Note.—Notice of an intent on the part of any road to invoke the provisions of this Rule should be issued by the designated transportation officer to the designated transportation officer of the road to which the notice is addressed, such notice to specify the type of cars and particular junction points involved.

Such notice may not limit acceptance to the individual cars previously delivered but may require the return of an equivalent number of home cars of

the type specified, at junction point where delivered loaded.

INTERPRETATIONS.

1. The words "Movement of Traffic" in this rule mean the movement regularly through any junction point of any kind of traffic in (or on) the same class of car.

2. Car Service Rule 6 gives to a railroad which may deliver regularly, to a connection through any junction, traffic of any kind in (or on) its cars of the same class, the right to require connection participating in the handling of traffic from the junction point, to use that point of interchange for the return of the class of empty cars engaged in the service, instead of returning them at some other junction less favorable to the receiving (owning) railroad. (April 25, 1923).

Rule 7 (A) Cars shall be considered as having been delivered to a connecting railroad when placed upon the track agreed upon and designated as the interchange track for such deliveries, accompanied or preceded by necessary data for forwarding and to insure delivery, and accepted by the car inspector of the receiving road.

Notwithstanding the foregoing paragraph, the receiving road shall be responsible for the cars, contents and per diem after receipt of the proper data (1) for forwarding and to insure delivery. This responsibility shall continue as respects cars rejected by the car inspector of the receiving road until such cars have been returned to the delivering road. The effect of this paragraph may be altered by special arrangements made between the roads concerned.

(1) *Note.*—The character of the necessary data will be determined by each receiving road in accordance with the conditions of its service.

(B) (1) Each railroad, with due regard for efficient and economical railroad operating practices or conditions beyond the carriers' control, will interchange within 24 hours after arrival or release at interchange station, all cars which it properly may interchange in accordance with the provisions of Section (A) of this rule, subject to the following exceptions (2) to (4) inclusive:

(2) Cars covered by an embargo.

(3) Cars covered by written or telegraphic notice given by the intended receiving line stating that it is unable to receive.

(4) Cars which cannot be placed physically upon the designated interchange track.

(C) When interchange required by Section (B), Paragraph (1) of the rule cannot be accomplished, the provisions of Per Diem Rule 15 will apply.

INTERPRETATIONS

Question.—After a car has been accepted by the inspector of the receiving road, is the delivering road relieved from responsibility for damage to car and contents?

Answer.—Yes. (June 20, 1924.)

Question.—Where a car has been accepted by the inspector of the receiving road, but is not accompanied or preceded by proper data for forwarding and to insure delivery, is the receiving road relieved from responsibility for damage to the car and contents?

Answer.—No; but the rule gives the right to receiving road to refuse to accept in interchange cars which are not accompanied or preceded by proper data

for forwarding and to insure delivery, and when such cars are not accepted in interchange they are still in the possession of the delivering road. (June 20, 1924).

(2) When a loaded freight car containing a shipment destined to a non-agency station (a station at which there is no freight agent), billed collect or insufficiently prepaid, is offered in interchange, it shall be accepted from the connecting carrier and forwarded to destination. (January 25, 1926).

(2) *Note.*—Rules of the A.A.R. Accounting Division make provision for the adjustment of freight charges between the originating and the delivering carrier.

Rule 8 The placing of advertisments or banners of any kind upon any freight or passenger car or locomotive (including permanent stakes which are a part of open top cars), is prohibited except:

(a) Advertisements or banners may be placed thereon for photographic purposes only, while such equipment is at rest on private tracks, or on service tracks of the railroad and when so placed must be removed prior to movements of the equipment, the placement and removal to be by and at the expense of the shipper or consignee.

(b) Advertisements may be painted upon passenger equipment used in special train movements, the expense of painting and removal to be borne by the user.

This does not prohibit the placing of advertisements or banners on the lading or attaching them to temporary stakes used to secure the lading on open top cars.

Note.—See Mechanical Division Interchange Rule 36.

Rule 9 When private tank cars are unloaded, the owner or lessee must issue instructions for the disposition of the empty car to the agent at point of un-

loading either direct or through consignee. If the owner or lessee fails to have instructions in the hands of the railroad agent having jurisdiction at point of unloading, prior to the time the car is made empty, to either hold or forward the car, the agent is authorized to forward the empty car to the origin point via the reverse of the loaded route. Shipping instructions must show name of commodity last loaded in car. The agent will bill (4) each car to final destination showing name of the consignee and full route including junction and name of commodity last loaded in car, using standard form of revenue waybill. The word "consignee" in this connection signifies the party to whom the empty tank car is forwarded.

(4) The word "bill" in this connection covers non-revenue billing which must be on standard form of waybill.

Rule 10 Unless otherwise agreed, the cost of transferring or rearranging the lading of freight cars shall be assumed as follows: (See Mechanical Division Interchange Rules 2, 107-A and 107-B.)

1. BY THE DELIVERING ROAD—When transfer or rearrangement of load at junction point is due to:

(a) Defective equipment that is not safe to run according to the Interchange Rules of the Mechanical Division, except where the repairs can be made under load as per Mechanical Division Interchange Rule 2.

(b) Contents improperly loaded (not complying with the Rules Governing the Loading of Commodities on Open Top Cars or General Rules 1 to 6 inclusive of Operating-Transportation Division Circular No. 42-C, covering Loading of Carload Shipments of Commodities in Closed Cars, or the Interstate Commerce Commission regulations for the Transportation of Explosives and Other Dangerous Articles by Freight and by Express), even though the load may

have originally conformed to such rules, except as provided in Paragraph 2(a).

Note.—It is not intended that closed cars be opened at junction point for interior inspection of loads unless the car shows exterior evidence of distress apparently due to lading conditions, or unless there is reason to believe that car had not been loaded in accordance with the above rules.

(c) Delivering road not desiring its equipment to go beyond junction point.

2. BY THE ROAD ON WHICH CAR WAS LOADED—(Originating road-haul carrier)—When transfer or rearrangement of load at junction or intermediate point is due to:

(a) (1) Load exceeding the stenciled load limit of car, or,

(2) Gross weight of car and lading in excess of the published weight restriction indicated in the current issue of the RAILWAY LINE CLEARANCES publication, or

(3) Overloaded under the provisions of the AAR Loading Rules, except when lading becomes a concentrated overload due to shifting of lading enroute.

(b) Dimensions of load of open top cars being in excess of the published clearances of any of the roads indicated in the routing, as shown in the current issue of the publication RAILWAY LINE CLEARANCES.

(c) Closed car having an inside length of over 50 ft. 6 in. which will not pass published clearances of any of the roads covered by the routing, as shown in the current issue of the publication RAILWAY LINE CLEARANCES.

(d) Car which cannot pass the approved third rail clearances of the Association of American Railroads, as shown in the current issue of the publication RAILWAY LINE CLEARANCES.

(e) Cars which cannot be handled to destination on account of exceeding the approved limited clearances of the Association of American Railroads shown in the current issue of the publication RAILWAY LINE CLEARANCES—(See Outline Diagram of Approved Limited Clearances of AAR appearing on other page).

Note.—Existing cars with door fixtures, handholds, etc., projecting beyond 10 feet 8 inches extreme width, but not beyond 10 feet 10 inches, will be considered as meeting the requirement of Paragraph (e).

Note.—The term "Originating road-haul carrier" is interpreted as the road which originates the billing and participates in the road-haul revenue.

3. BY THE RECEIVING ROAD—When transfer or rearrangement of load at junction or intermediate point is due to:

(a) Cars which are properly loaded in accordance with provisions of Section 2.

Note.—Unless otherwise agreed, when receiving road refuses to accept car requiring transfer or adjustment of load, the delivering road may effect transfer or adjustment of load and render bill against receiving road.

(b) Cars which cannot be moved through on account of any other disability of receiving line.

(c) Receiving road desiring to transfer to save cost of mileage or per diem.

Note 1.—Charges for actual labor and material, also for use of wrecking outfit, hoist, derrick, traveling crane or similar facilities used in the transfer or adjustment of lading under this rule, shall be as provided for in Mechanical Division Interchange Rules 107-A and 107-B.

Note 2.—Bills for work performed under this Rule may be declined if not rendered within 1 year from the date work is completed.

Rule 11 (A) Unless otherwise agreed, when carload freight is delivered in interchange without evidence of proper weight shown on billing, any participating road-haul carrier may weigh the car, and the originating road-haul carrier shall pay it $10.00 per car weighed, except as provided in paragraph (C), and except that bills under this rule must be presented within 3 years from the date of waybill originating movement of car weighed.

(B) The point at which loading is completed will be considered as the point of origin of a stop-off car. (Rule 51 of Consolidated Freight Classification No. 19, vacated September 22, 1970, after which the provision of individual tariffs apply.)

(C) The first road-haul carrier is responsible for proper weighing of carload freight originating on railroads less than 100 miles in length without scale facilities, and for showing evidence of proper weight on the waybill. This paragraph does not apply to railroads less than 100 miles in length which had track scale facilities as of April 1, 1946, unless otherwise agreed as provided in paragraph (A).

(D) As evidence of proper weight, notation shall be made on waybill (also on non-revenue car movement waybill if used) in accordance with the AAR Accounting Division Freight Mandatory Rules No. 25, 26, 27 and 33, or as amended; except the penalty charge provided for in Car Service Rule 11 will not be applicable to shipments moving on waybills carrying in "Weighed" block (or on non-revenue car movement waybill if used) endorsement—"Do Not Weigh—Destination Agreement Weights" or "Do Not Weigh—Destination Weights Apply".

(E) The charge prescribed in this rule is not intended to cover the cost of weighing, but is a penalty for failure to comply with applicable Mandatory Rules of the AAR Accounting Division.

(F) The following definitions will govern in the application of this Rule:

1. Originating Road-Haul Carrier

(a) A road other than terminal switching road on which a carload is loaded.

(b) "Carrier Road" as defined in the Code of Switching Reclaim Rules.

2. Terminal Switching Road—The same as published in the Code of Switching Reclaim Rules.

3. Switching Charge—A Switching Charge is a charge assessed on a ton or a car basis for handling a car in switching service. (This is in accord with Per Diem Rule 5, Interpretation (a).)

4. Grain—All commodities listed under the caption GRAIN in Consolidated Freight Classification No. 20 or in Uniform Freight Classification No. 2, Supplements thereto, or reissues thereof.

Note.—Rule 11 does not apply to cars loaded with livestock, grain, soy beans, or perishables under refrigeration.

Rule 12 Cars containing refuse may be rejected by the receiving road when offered in interchange as empty cars.

Rule 13 When trains of one railroad use the tracks of another in avoiding washouts or other obstructions, unless other arrangements exist between the roads concerned, the detour shall be made under the terms of the Detour Agreement approved by the Association, which terms are made part of this rule. 6

The road for which the train is detoured shall pay the regular per diem (or mileage), to the owners of the cars in the train, including the road owning the track, if any of its cars shall be in the detoured train. All mileage charges shall be at actual distance over the route used.

6 Note.—When such an agreement is entered into, it should be executed on behalf of each company party thereto by an executive officer thereof.

Rule 14 (A) Box cars classed as suitable for grain loading or better, or refrigerator cars, must not be loaded with any of the contaminating commodities listed below. If so loaded and it becomes necessary to renew floors, lining, or sheathing (including associated parts), or portions thereof, in order to restore car to previous loading classification because of contamination due to such loading, the cost of the repairs, notwithstanding any other provisions of these rules, shall be assumed by the road (either switching or road haul) responsible for furnishing the car for such loading.

1. Animal Products:

(a) Hides, Pelts, or Skins.
(b) Glue Stock.
(c) Manure, or Fertilizing Compounds with Contaminating Odor.
(d) Meat Refuse, Offal, Tankage, or Waste from Slaughtered Animals.
(e) Bones, or Horns with Contaminating Odor.
(f) Dried Blood.
(g) Tallow.

2. Copra.
3. Fish Scrap or Fish Meal.
4. Shell Fish in Bulk.
5. Shells (clam, mussel, or oyster) in raw state with contaminating odor.
6. Asphalt (Asphaltum) Natural, or Asphalt Compounds, by-products or Petroleum.
7. Creosote, or Creosoted Materials.
8. Lamp Black, Carbon Black (all types), Graphite (Black Lead), or Plumbago.

9. Poisonous Chemicals or Compounds in containers or bulk.

(B) The following commodities must not be loaded in foreign box cars classed as suitable for grain loading or better, or refrigerator cars, except that such cars of any road participating in the haul may be used when such usage is authorized by the owner.

1. Battery parts such as cylinders, frames, or plates, burned out or scrap.
2. Charcoal, in bulk or cloth bags.
3. Coal, coke, lignite or briquettes.
4. Containers, empty, such as barrels, cans, drums or pails when previous use was for acids, asphalt, chemicals, creosote, grease, oils, tar, tankage and similar contaiminating commodities, unless properly cleaned inside and outside to prevent contamination.
5. Cotton or other seeds, hulls, fibre or shavings, when oily or dyed, in bulk or in containers which would result in contamination.
6. Glass, crushed, ground or powdered, in containers or in bulk.
7. Graphite in containers, which would result in contamination.
8. Greasy or oily products in bulk or in containers which would result in contamination, such as:

(a) Metal borings and turnings.
(b) Bearings.
(c) Chains.
(d) Electrical apparatus.
(e) Iron or steel bars, plates or shapes.
(f) Machine parts.
(g) Machinery.
(h) Pipe and pipe fittings.
(i) Scrap.

(j) Tin plate (oiled).

(k) Vehicle parts, including farm implements and tractors.

9. Insecticides, fungicides, insect repellents, vermine exterminators, poisonous, in containers or bulk.

10. Peat, or peat moss in bulk.

11. Tar and tar products in barrels, and tar refuse.

12. Acids.

13. Grease.

14. Molasses.

15. Oils.

16. Petroleum or petroleum products, including compounded oils or greases having a petroleum base.

Rule 15 (1) Carriers shall record all requests for cars for loading, which shall include the following information if available:

(a) Date and time.

(b) Name of party.

(c) Name of person receiving request.

(d) Kind and size of cars wanted.

(e) Number of cars wanted.

(f) Date wanted (See Note 1 below).

(g) Commodity to be loaded.

(h) Destination and route.

Note 1.—If order covers more than one date it must state number of cars wanted separately for each day.

(2) Request for cars shall be accepted only by the road on which the car is to be loaded.

(3) On cars originating in switching service, the road performing the switching service shall, if cars of suitable ownership under these rules are immediately available, furnish cars for loading for road-haul via another carrier. If such cars are not immediately available, the switching carrier shall immediately or-

der suitable cars from the designated road-haul carrier in the manner required by paragraph (1). Cars ordered by switching carriers from road-haul carriers for return loading in road-haul service will be furnished by road-haul carriers in the same manner and to the same extent as cars ordered by industries directly served by it.

(4) Switching carriers are obligated to furnish or arrange for cars required for loading to destinations within the same switching limits.

Rule 16 (A) When, after the effective date of these rules, specific cars covered by CSD 145 and 435 series are assigned to a shipper for his exclusive use, such assignment shall be made subject to the following conditions:

1. Shipper must request in writing of originating road-haul carrier(s) assignment at least ten (10) days before their intended use of a specific number of cars. If originating carrier(s) agrees to such assignment but desires other road-haul carriers to participate in assignment, it will advise shipper accordingly and will make request on such other carriers.

2. Pools of assigned cars including cars of ownership other than the originating road-haul carriers may be expanded only upon the acceptance by the originating road-haul carriers.

3. When cars are assigned in accordance with this Rule, they shall remain and be treated as assigned cars until the shipper or owning railroad notifies the other and the originating road-haul carrier(s) in writing at least ten (10) days in advance that such assignment is modified or canceled.

(B) Assigned cars shall not be held empty enroute to loading point, except as follows:

(a) Upon written instructions of assignee.

(b) When assignee cannot immediately accept on arrival at loading point and cars cannot reasonably be held on other tracks at loading points.

(c) For necessary repairs (not cleaning).

(C) The present and future assignment by a carrier of specific cars for the exclusive use of a shipper at a particular point shall be reported by such carrier to the Operating-Transportation Division of the Association of American Railroads by car initial, number, car type code and specific assignment. Each carrier assigning such cars shall advise the Operating Transportation Division of the Association of American Railroads of any change in assignment not later than the last working day of the month in which change occurred. The Operating-Transportation Division of the Association of American Railroads will maintain a current record of cars assigned, and distribute such information to car owners assigning cars to a specific shipper at each location, as well as to the roads originating traffic from such assignments, including originating switching line serving the shipper involved. The foregoing provisions of this paragraph shall not apply when all cars assigned to the exclusive use of a shipper at a particular point are system cars of a single road-haul carrier serving the shipper at such point.

(D) Assigned cars are exempt from Car Service Rules 1 and 2 at initial loading stations.

Rule 17 Loaded cars will not be held at any point between origin and destination, with due regard for efficient railroad operating practices, except as follows:

(a) To perform any service specifically authorized by applicable tariffs.

(b) To make necessary repairs to cars, including adjustment of lading.

(c) To obtain necessary authority for movement of car, or to obtain authority for transfer or rearrangement of lading, when loaded to dimensions or weights in excess of those published in Railway Line Clearances.

(d) When consignee is unable to accept immediately upon arrival and car cannot reasonably be held at destination.

(e) Cars loaded in violation of an embargo.

(f) When normal route of movement is blocked because of accident, high water, damage to track or other disability of this railroad.

Rule 18 1. Each railroad will undertake to:

(A) Placing of Cars;

(1) Use reasonable diligence to place loaded cars promptly following arrival at destination.

(B) Removal of Cars:

(1) Carriers shall use reasonable diligence to promptly remove empty cars from point of unloading or interchange tracks of industrial plants following unloading or release by consignee or shipper, unless such empty cars are ordered or appropriated by the shipper with approval of carrier for reloading.

(2) Carriers shall use reasonable diligence to:

(a) Promptly remove outbound loaded freight cars from point of loading or interchange tracks of industrial plants following acceptance by carrier of shipping instructions; and

(b) Thereafter promptly forward such cars in line-haul service.

(3) Cars subject to Paragraphs (B) (1) and (B) (2) which are not in fact made accessible to the

carrier because of the actions of the consignee or consignor, shall be deemed not to have been released until such cars are in fact made accessible to the carrier.

2. Each railroad will, with due regard for efficient railroad operating practices, hold no more cars for prospective loading at any time for any industry which it serves, than those needed to protect current requirements.

APPENDIX E

Formula for determining car ownership requirements with national interline car requirements allocated among roads on the basis of interline car days (excludes all private car data)

(BUREAU OF ACCOUNTS, INTERSTATE COMMERCE COMMISSION)

Line No.	Item	Source[1]
	Calculation of serviceable car days applicable to local and interline service	
1	Total car days of cars originated and terminated on line	Appendixes E and F, section XIV, items (A)(1) plus (A)(2)
2	Total car days of cars originated and delivered to connections, received from connections and terminated, and bridged to connections	Appendixes E and F, section XIV, sum of items (B)(1), (B)(2), (C)(1)(a), (C)(1)(b), (C)(2)(a), and (H)(3)(a).
3	Total local and interline car days	Line 1 plus line 2
4	Total bad order days	Appendixes E and F, section XIV, items (I)(1) plus (I)(2)
5	Percent of bad order days to total car days	Line 4 divided by line 3
6	Bad order car days assignable to local car days	Line 1 multiplied by line 5
7	Bad order car days assignable to interline car days	Line 2 multiplied by line 5
8	Total serviceable car days—local service	Line 1 minus line 6
9	Total serviceable car days—interline service	Line 2 minus line 7
10	"No day" cars	Appendixes E and F, section XIV, item (D)(1)
11	Average number of hours per "no day" car	Appendixes E and F, section XIV, item (D)(2)
12	"No day" car days	Line 10 multiplied by 11 divided by 24 hours
13	Total serviceable car days including "no day" car days—interline service	Line 9 plus line 12
14	Each road's percentage of interline car days—adjusted for "no day" car days	Line 13, columns (4) to (10) divided by U.S. total line 13, column (3).
15	Each road's serviceable interline car days after adjustment for "no day" car days	Line 9 multiplied by percentage in line 14
16	Total reclaim days paid	Appendixes E and F, section XIV, item (O)(9)(b)
17	Total reclaim days received	Appendixes E and F, section XIV, item (O)(10)(b)
18	Total serviceable interline car days after adjustment for reclaim days	Line 15 plus line 16 minus line 17

See footnote at end of table.

Formula for determining car ownership requirements with national interline car requirements allocated among roads on the basis of interline car days (excludes all private car data)—Continued

(BUREAU OF ACCOUNTS, INTERSTATE COMMERCE COMMISSION)—*Continued*

Line No.	Item	Source
	Calculation of serviceable car days applicable to local and interline service—Continued	
19	Serviceable cars required to protect local traffic carried	Line 8 divided by 31 days
20	Serviceable cars required to protect interline traffic carried	Line 18 divided by 31 days
	Requirement to protect local and interline shortages	
21	Total carloads originated	Appendixes C and D, section I, item (D)
22	Total carloads originated and terminated on line	Appendixes C and D, section III, item (A)
23	Total carloads originated and delivered to connections	Line 21 minus line 22
24	Percentage of cars originated in local service	Line 22 divided by line 21
25	Average daily shortage of freight cars	Appendixes C and D, section VII, item (A), sum of 4 weeks divided by 28.
26	Average daily shortage—local service	Line 25 multiplied by percents in line 24
27	Average daily shortage—interline service	Line 25 minus line 26
28	Serviceable car days per car loaded in local service	Line 8 divided by line 22
29	Serviceable cars required to protect local shortages	Line 26 multiplied by line 28
30	Serviceable car days per car loaded in interline service—United States	Line 18, column (3) divided by line 23, column (3)
31	Total serviceable cars required to protect interline shortages—through to destination	Line 27, column (3) multiplied by line 30, column (3)
32	Total car days of cars loaded and delivered to connections	Appendixes E and F section XIV, items (B)(1) plus (B)(2)
33	Bad order car days assignable to cars loaded and delivered to connections	Line 32 multiplied by line 9
34	Total serviceable car days on cars loaded and delivered to connections	Line 32 minus line 33
35	Serviceable car days per car loaded and delivered to connections	Line 34 divided by line 23

See footnote at end of table

Formula for determining car ownership requirements with national interline car requirements allocated among roads on the basis of interline car days (excludes all private car data)—Continued

(BUREAU OF ACCOUNTS, INTERSTATE COMMERCE COMMISSION)—*Continued*

Line No.	Item	Source[1]
	Requirement to protect local and interline shortages—Continued	
36	Each road's serviceable requirement to protect potential interline originations to the interchange	Line 27 multiplied by line 35
37	Remaining serviceable United States requirement to protect potential interline use—beyond the originating road	Line 31, column (3) minus line 36, column (3)
38	Each road's participation in serviceable interline car days	Line 18, columns (4) to (10) divided by United States total line 18, column (3).
39	Each road's serviceable requirement to protect potential interline use	Line 37 multiplied by percent in line 38
40	Each road's serviceable requirement to protect potential interline originations and use	Line 36 plus line 39
41	Total serviceable requirement to protect local and interline traffic carried and offered	Line 19 plus line 20 plus line 29 plus line 40
42	Total serviceable ownership—October 1, 1964	Appendixes C and D, section VIII, item (A) minus items (A)(1) and (A)(2).
43	(Excess) or deficiency	Line 41 minus line 42

[1] References to appendixes C, D, E, and F are to the appendixes to the order of July 29, 1964. Reference to sections and items are to sections and items in appendix B to the order of July 29, 1964. Pertinent portions thereof are shown in appendix A hereto.

APPENDIX F

Car ownership formula adopted by AAR on August 26, 1966

1. Total local car days = those loaded and empty car days used on cars loaded and terminated on line during the month of October 1964. [1] [Sec. XIV (A) (1)] + [Sec. XIV (A) (2)]

1(a). Total interline car days = those loaded and empty car days on cars loaded and delivered to connections, loaded cars received from connections and terminated on line, loaded cars received from connections and delivered to connections, and empty cars received from connections and delivered to connections. [Sec. XIV (B) (1)] + [Sec. XIV (B) (2)] + [Sec. XIV (C) (1) (a)] + [Sec. XIV (C) (1) (b)] + [Sec. XIV (C) (2) (a)] + [Sec. XIV (H) (1) (b)] + [Sec. XIV (H) (2) (a)] + [Sec. XIV (H) (3) (a)]

1(b). Total local and interline car days = sum of local plus interline car days. (Line 1 + line 1(a))

1(c). Total bad order car days = the total number of days cars were being held for heavy and light repairs during the month of October 1964 which were included in the total local and interline car days reported in 1 and 1(a). [Sec. XIV (I) (1)] + [Sec. XIV (I) (2)]

1(d). Percent bad order car days of total car days reported=the total number of bad order car days divided by the total of local and interline car days reported. (Line 1(c) ÷ 1(b))

1(e). Bad order local car days = the total num-

[1] Indicates section and subsection of ExParte No. 241 Questionnaire, appendix B to the order of July 29, 1964. These are also shown in appendix A hereto.

ber of local car days multiplied by the percent of bad order car days to total car days. (Line 1 x line 1(d))

1(f). Bad order interline car days = the total number of interline car days multiplied by the percent of bad order car days to total car days. (Line 1(a) x line 1(d))

Note: The computations in 1(e) and 1(f) break down the total bad order car days between local and interline on the same ratio as total car days break down between local and interline.

1(g). Serviceable local car days = the total number of local car days reported minus the proportionate number of total bad order car days computed as apportioned to local car days. (Line 1—line 1(e))

1(h). Serviceable interline car days = the total number of interline car days reported minus the proportionate number of the total bad order car days computed as apportioned to interline car days. (Line 1(e) – line 1(f))

2. Total cars loaded in local service = the number of cars reported as loaded and terminated on line during October 1964. [Sec. III (A) Total]

3. Serviceable car days per car loaded in local service = the total number of computed serviceable local car days used in October 1964 divided by the number of cars loaded in local service during October 1964. (Line 1 g) ÷ 31 days)

4. Serviceable cars used to protect local traffic = total serviceable local car days computed in October 1964 divided by 31 days in month. (Line 1(g) ÷ 31 days)

5. No day cars = the number of cars handled in less than a per diem day. [Sec. XIV (D)(1)]

6. "No day" car days = the number of cars handled in less than a per day multiplied by the average number of hours per car reported on these cars, di-

vided by 24 hours. [Sec. XIV (D) (1)] x [Sec. XIV (D) (2)] ÷ 24

6(a). Total reclaim days paid = the total number of per diem days on which reclaims were paid during October 1964. [Sec. XIV (O) (9) (b)]

6(b). Total reclaim days received = the total number of per diem days on which reclaims were received during October 1964. [Sec. XIV (O) (10) (b)]

7. Total serviceable interline car days chargeable =the total number of serviceable interline cars days reported in line 1(h) above plus the total number of "no day" car days computed in line 6 above plus the total number of reclaim car days paid in line 6(a) minus the total number of reclaim car days received in line 6(b) above.

8. Percent each road to total U. S. serviceable interline car days=the total serviceable interline car days chargeable to each road divided by the U. S. class I total of serviceable interline car days.

9. Total ownership October 1, 1964=the total number of cars owned as of October 1, 1964. [Sec. VIII (A)]

9(a). Bad order cars=the number of cars reported as held for heavy and light repairs as of October 1, 1964. [Sec. VIII(A) (1)]+[Sec. VIII(A) (2)]

9(b). Serviceable ownership October 1, 1964 = total ownership reported October 1, 1964 minus bad order cars October 1, 1964. (Line 9÷line 9(a))

10. Serviceable ownership obligation to protect interline traffic=the total number of serviceable interline car days divided by 31 days in October 1964. (Line 7÷31 days)

11. Total serviceable ownership obligation to the existing serviceable fleet to protect local and interline traffic=the number of serviceable cars used to protect local traffic as shown in line 4 above plus the

serviceable ownership to protect interline traffic as shown in line 10 above.

CAR SERVICE RULES OBSERVANCE CREDIT

12. Average number of foreign cars loaded daily and delivered to connections—the total number of foreign cars loaded and delivered to connections during October 1964 divided by the 31 days in the month. [Sec. III(B) Total Foreign] divided by 31.

13. Percent Car Service Rules Observance—percentage of Car Service Rules observance by districts developed by sampling of Car Service Division field men Car Service Rules observance checks.

13(a). Number of foreigns credited daily as loaded in accordance with Car Service Rules—the average number of foreign cars loaded daily and delivered to connections multiplied by the percent of Car Service Rules observance. (Line 12 x line 13)

13(b). Total car days on cars loaded and delivered to connections—the total loaded and empty car days reported during October 1964 on cars loaded and delivered to connections. [Sec. XIV(B)(1)]+Sec. XIV (B)(2)]

13(c). Bad order car days on cars loaded and delivered to connections—the total number of car days on cars loaded and delivered to connections multiplied by the percent of bad order car days of total car days. (Line 13(b) x line 1(d))

13(d). Serviceable car days on cars loaded and delivered to connections—total car days on cars loaded and delivered to connections minus the proportionate number of the total bad order car days computed as apportioned to total car days on cars loaded and delivered to connections. (Line 13(b)—line 13(c))

13(e). Serviceable car days per car loaded and delivered to connections—total serviceable car days on

cars loaded and delivered to connections in October 1964 divided by total number cars loaded and delivered to connections during October 1964. (Line 13(d) ÷line 23(a))

13(f). Serviceable ownership reduction due to Car Service Rules observance credit=total number of cars credited daily as loaded in accordance with Car Service Rules multiplied by the average serviceable car days per car on cars loaded and delivered to connections. (Line 13(a) x line 13(e))

13(g). Serviceable interline ownership obligation after allowing Car Service Rules credit=serviceable interline ownership obligation reported on line 10 minus number of cars credited as loaded in accordance with Car Service Rules on line 13(f).

14. Percent each roads obligation to the total serviceable interline fleet after allowing Car Service Rules credit=the serviceable interline ownership obligation of each road after allowing Car Service Rules credit divided by the total U. S. interline fleet required after allowing Car Service Rules credit. (Each road line 13(g)÷by U. S. total line 13(g))

14(a). Serviceable car obligation to existing interline fleet after Car Service Rules credit=existing serviceable interline fleet requirement line 10 multiplied by percent of obligation to interline fleet after Car Service Rules credit as shown on line 14.

CARS NEEDED TO PROTECT LOCAL AND INTERLINE SHORTAGES

15. Percent local loading of total loading=total cars loaded and terminated on line divided by total number cars loaded. [Sec. III(A) Total]÷[Sec. I (D) Total]

16. Average daily shortage=average of the four weekly shortages reported divided by 7. [Sec. VII (A)].

17. Average daily shortage for local loading= average daily shortage multiplied by the percent local loading of total loading. (Line 16 x line 15)

18. Average daily shortage for interline loading= average daily shortage minus average daily shortage for local loading. (Line 16—line 17)

18(a). Average daily loading local traffic=total number of cars loaded in local service during October 1964 divided by 31 days in the month. (Line 2÷31 days) [Sec. III(A) Total]÷31

19. Average daily adjusted potential local loading =average daily local loading plus ½ average daily shortage for local loading. (Line 18(a)+½ of line 17)

20. Serviceable cars required to protect adjusted shortages for local loading=½ of daily shortage for local loading multiplied by serviceable car days per car used in local service. (½ of line 17 x line 3)

21. Serviceable cars required to protect adjusted potential local traffic=total number of serviceable cars used to protect local traffic during October 1964 plus the number of serviceable cars required to protect ½ shortage for local loading during October 1964. (Line 4+line 20)

22. Average daily loading of interline traffic= total number of cars reported as loaded and delivered to connections during October 1964 divided by the 31 days in the month. [Sec. III(B) Total]÷31 or (Line 23(a) below÷31)

23. Average daily adjusted potential interline loading=the average daily loading of interline traffic plus ½ the average daily shortage for interline loading. (Line 22+½ of line 18)

23(a). Total cars loaded and delivered to connections=the number of cars loaded and delivered to connections during October 1964. [Sec III(B) Total]

23(b). National average serviceable car days per car in interline service=total U. S. serviceable interline car days from line 7 divided by U. S. total cars reported as loaded and delivered to connections on line 23(a).

23(c). Total serviceable cars needed to protect interline shortages=total shortages reported for interline loading multiplied by the national average of serviceable car days per car in interline service. (U.S. Total line 18 x line 23(b))

23(d). Each roads serviceable ownership obligation to protect potential interline originations=average daily shortage of each road for interline loading multiplied by each roads average number of serviceable car days per car loaded and delivered to connections. (Line 18 x line 13(e))

23(e). Remaining serviceable interline U. S. fleet to protect potential interline use=total number of serviceable cars needed to protect total U. S. interline shortages minus the total of each roads serviceable ownership needed to protect potential interline originations. (Total line 23(c)—Total line 23(d))

23(f). Each roads serviceable ownership requirement to protect potential interline use=serviceable U. S. interline fleet to protect potential interline use multiplied by each roads percent of total U. S. serviceable interline car days actually used during October 1964. (Line 23(e) x line 8)

24. Each roads serviceable ownership to protect potential interline originations and potential use=each roads serviceable ownership required to protect potential interline originations plus interline use. (Line 23(d)+line 23(f))

25. Serviceable ownership to protect adjusted potential interline traffic with credit for Car Service Rules observance=each roads serviceable car ownership obligations to the existing interline fleet after allowing credit for Car Service Rules observance plus ½ of serviceable ownership required to protect full potential interline originations and interline use. (Line 14(a)+½ of line 24)

SERVICEABLE OWNERSHIP OBLIGATION TO PROTECT ADJUSTED POTENTIAL LOCAL AND INTERLINE TRAFFIC

26. *With credit for Car Service Rules observance* =serviceable cars required to protect adjusted potential local loading (line 21) plus serviceable ownership needed to protect adjusted potential interline traffic *with credit for Car Service Rules observance* (line 25)

27. Excess or deficit serviceable ownership October 1, 1964 compared serviceable ownership requirement. (Line 9(b)—line 26)

APPENDIX G

Rules prescribed for mandatory observance [1]

Rule 1. Foreign cars, empty at a junction with the home road, must be:

(a) Loaded at that junction to or via home rails, or,

(b) Delivered empty at that junction to home road, except in instances where Rule 6 has been invoked, or unless otherwise agreed by roads involved.

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[1] Numbering of AAR Code of Car Service Rules retained. Appropriate definitions are shown at the end of this appendix.

Rule 2 Foreign empty cars other than those covered in Rule 1 shall be:

(a) Loaded to or via owner's rails.

(b) Loaded to a destination closer to owner's rails than is the loading station or delivered empty to a short line or switch loading road for such loading. (Car Selection Chart is designed to aid in so selecting cars for loading)

(c) Delivered empty to the home road at any junction subject to Rule 6.

(d) Delivered empty to the road from which originally received under load, at the junction where received, EXCEPT that when handled in road haul service, cars of direct connection ownership may not be delivered empty to a road which does not have a direct connection with the car owner.

(e) Return empty to the delivering road when handled only in switching service.

Note.—Box cars covered by Car Service Division Special Car Order No. 90 should be handled as provided therein.

NOTES TO CAR SERVICE RULES 1 AND 2

(A) 1. "Junction" as used in these rules means stations where roads interchange cars at a common point or within switching limits over their own lines, or an intermediate line or lines, or a car ferry or float within such limits. Roads so interchanging cars shall be considered direct connections.

2. This information should be published in THE OFFICIAL RAILWAY EQUIPMENT REGISTER, and when the interchange is other than over their own rails, the channel through which the interchange is effected must be shown.

(B) Inequities resulting from these rules should be resolved by negotiations between the roads involved,

and exception to the rules is permitted following such resolvement and concurrence by the Car Service Division.

Rule 6 [2] (To be followed in conjunction with Rules 1 and 2)

If a movement of traffic requires return of empty cars to home road via the junction at which cars were delivered in interchange under load, the home road may demand return of empty cars at such junction, except that cars offered a home road for repairs, in accordance with the Interchange Rules of the Mechanical Division, must be accepted by owners at any junction point.

Note.—Notice of an intent on the part of any road to invoke the provisions of this Rule should be issued by the designated transportation officer to the designated transportation officer of the road to which the notice is addressed, such notice to specify the type of cars and particular junction points involved.

Such notice may not limit acceptance to the individual cars previously delivered, but may require the return of an equivalent number of home cars of the type specified, at junction point where delivered loaded.

INTERPRETATIONS

1. The words "Movement of Traffic" in this Rule mean the movement regularly through any junction points of any kind of traffic in (or on) the same class of car.

2. Car Service Rule 6 gives to a railroad which may deliver regularly, to a connection through any junction, traffic of any kind in (or on) its cars of the same class, the right to require connection participating in the handling of traffic from the junction

[2] Rule 6 is not being prescribed. It is listed here for informational purposes only.

point, to use that point of interchange for the return of the class of empty cars engaged in the service, instead of returning them at some other junction less favorable to the receiving (owning) railroad. (April 25, 1923.)

Rule 7 (A) Cars shall be considered as having been delivered to a connecting railroad when placed upon the track agreed upon and designated as the interchange track for such deliveries, accompanied or preceded by necessary data for forwarding and to insure delivery, and accepted by the car inspector of the receiving road.

Notwithstanding the foregoing paragraph, the receiving road shall be responsible for the cars, contents and per diem after receipt of the proper data (1) for forwarding and to insure delivery. This responsibility shall continue as respects cars rejected by the car inspector of the receiving road until such cars have been returned to the delivery road. The effect of this paragraph may be altered by special arrangements made between the roads concerned.

(1) *Note.*—The character of the necessary data will be determined by each receiving road in accordance with the conditions of its service.

(B) 1. Each railroad, with due regard for efficient and economical railroad operating practices or conditions beyond the carriers' control, will interchange within 24 hours after arrival or release at interchange station, all cars which it properly may interchange in accordance with the provisions of Section (A) of this rule, subject to the following exceptions (2) to (4) inclusive:

2. Cars covered by an embargo.

3. Cars covered by written or telegraphic notice given by the intended receiving line stating that it is unable to receive.

4. Cars which cannot be placed physically upon the designated interchange track.

(C) When interchange required by Section (B), Paragraph (1) of the rule cannot be accomplished, the provisions of Per Diem Rule 15 will apply.

INTERPRETATIONS

Question.—After a car has been accepted by the inspector of the receiving road, is the delivering road relieved from responsibility for damage to car and contents?

Answer.—Yes. (June 20, 1924.)

Question.—Where a car has been accepted by the inspector of the receiving road, but is not accompanied or preceded by proper data for forwarding and to insure delivery, is the receiving road relieved from responsibility for damage to the car and contents?

Answer.—No; but the rule gives the right to receiving road to refuse to accept in interchange cars which are not accompanied or preceded by proper data for forwarding and to insure delivery, and when such cars are not accepted in interchange they are still in the possession of the delivering road. (June 20, 1924.)

(2) When a loaded freight car containing a shipment destined to a non-agency station (a station at which there is no freight agent), billed collect or insufficiently prepaid, is offered in interchange, it shall be accepted from the connecting carrier and forwarded to destination. (January 25, 1926.)

(2) *Note.*—Rules of the A.A.R. Accounting Division make provision for the adjustment of freight charges between the originating and the delivering carrier.

PER DIEM RULE 15 [3]

(a) A road failing to receive promptly from a connection car on which it has laid no embargo, shall be responsible to the connection for the per diem on cars so held for delivery, including the home cars of such connection.

A road failing to receive promptly from a connection empty cars at home on its road, moving home under Car Service Rules, shall be responsible to the connection for double the per diem on such cars held for delivery after the first day for which reclaim is made.

(b) If such failure to receive shall continue for more than 3 days, the delinquent line shall thereafter in addition be responsible for the per diem on all cars wherever in transit which are thus held back for delivery.

(c) It shall be the duty of the connection intending to reclaim to notify the delinquent line daily, prior to midnight, through the designated representative at the point where cars are offered, of the total number of cars so held for it, and within 48 hours from midnight of the day cars are offered furnish the initials and numbers of the cars.

(d) The reclaim accruing under this rule on a car handled in terminal switching service can only be made for the detention in excess of the reclaim allowable under Per Diem Rule 5.

(e) When the hour at which the receiving road clears the interchange track is so late that the delivering road cannot place on interchange track before midnight, cars which it is holding for delivery, the receiving road shall be responsible for the Per

[3] Per Diem Rule 15 is not being prescribed. It is listed here for informational purposes only in conjunction with Rule 7.

Diem on such cars for the following day, subject to local agreement as to time required to make delivery.

(f) This rule shall apply in connection with loaded cars interchanged between a common carrier by water and a common carrier by railroad except where in conflict with applicable tariffs and divisional agreements.

(g) This rule shall apply in connection with empty cars interchanged between a common carrier by water and a common carrier by railroad.

INTERPRETATIONS

15(a) Question:—In case a car held for a certain road is not delivered to that road, can reclaim be made against such road?

Answer:—No.

15(b) Question:—Is it necessary to furnish initials and numbers of cars held which have previously been reported by initials and number

Answer:—No.

15(c) Question:—When a road cannot accept cars from a connection, is it necessary for the connection to notify the delinquent line before midnight each day of the total number of cars held for which reclaim is to be made?

Answer:—Yes.

15(d) Question:—When a road has invoked the provisions of Car Service Rule 6, and cars are offered to that road at another junction point, is the holding road entitled to reclaim under Per Diem Rule 16?

Answer:—No.

Rule 15. (1) Carriers shall record all requests for cars for loading, which shall include the following information if available:

(a) Date and time.
(b) Name of party.
(c) Name of person receiving request.
(d) Kind and size of cars wanted.
(e) Number of cars wanted.
(f) Date wanted (See Note 1 below).
(g) Commodity to be loaded.
(h) Destination and route.

Note 1.—If order covers more than one date it must state number of cars wanted separately for each day.

(2) Request for cars shall be accepted only by the road on which the car is to be loaded.

(3) On cars originating in switching service, the road performing the switching service shall, if cars of suitable ownership under these rules are immediately available, furnish cars for loading for road-haul via another carrier. If such cars are not immediately available, the switching carrier shall immediately order suitable cars for the designated road-haul carrier in the manner required by paragraph (1). Cars ordered by switching carriers from road-haul carrier for return loading in road-haul service will be furnished by road-haul carriers in the same manner and to the same extent as cars ordered by industries directly served by it.

(4) Switching carriers are obligated to furnish or arrange for cars required for loading to destinations within the same switching limits.

Rule 16 (A) When, after the effective date of these rules, specific cars covered by CSD 145 and 435 series are assigned to a shipper for his exclusive use, such assignment shall be made subject to the following conditions:

1. Shipper must request in writing of originating road-haul carrier(s) assignment at least ten (10)

days before their intended use of a specific number of cars. If originating carrier(s) agrees to such assignment but desires other road-haul carriers to participate in assignment, it will advise shipper accordingly and will make request on such other carriers.

2. Pools of assigned cars including cars of ownership other than the originating road-haul carriers may be expanded only upon the acceptance by the originating road-haul carriers.

3. When cars are assigned in accordance with this Rule, they shall remain and be treated as assigned cars until the shipper or owning railroad notifies the other and the originating road-haul carrier(s) in writing at least ten (10) days in advance that such assignment is modified or canceled.

(B) Assigned cars shall not be held empty enroute to loading point, except as follows:

(a) Upon written instructions of assignee.

(b) When assignee cannot immediately accept on arrival at loading point and cars cannot reasonably be held on other tracks at loading points.

(c) For necessary repairs (not cleaning).

(C) The present and future assignment by a carrier of specific cars for the exclusive use of a shipper at a particular point shall be reported by such carrier to the Operating-Transportation Division of the Association of American Railroads by car initial, number, car type code and specific assignment. Each carrier assigning such cars shall advise the Operating-Transportation Division of the Association of American Railroads of any change in assignment not later than the last working day of the month in which change occurred. The Operating-Transportation Division of the Association of American Railroads will maintain a current record of cars assigned,

and distribute such information to car owners assigning cars to a specific shipper at each location, as well as to the roads originating traffic from such assignments, including originating switching line serving the shipper involved. The foregoing provisions of this paragraph shall not apply when all cars assigned to the exclusive use of a shipper at a particular point are system cars of a single road-haul carrier serving the shipper at such point.

(D) Assigned cars are exempt from Car Service Rules 1 and 2 at initial loading stations.

Rule 17. Loaded cars will not be held at any point between origin and destination, with due regard for efficient railroad operating practices, except as follows:

(a) To perform any service specifically authorized by applicable tariffs.

(b) To make necessary repairs to cars, including adjustment of lading.

(c) To obtain necessary authority for movement of car, or to obtain authority for transfer or rearrangement of lading, when loaded to dimensions or weights in excess of those published in Railway Line Clearances.

(d) When consignee is unable to accept immediately upon arrival and car cannot reasonably be held at destination.

(e) Cars loaded in violation of an embargo.

(f) When normal route of movement is blocked because of accident, high water, damage to track or other disability of this railroad.

Rule 18 1. Each railroad will undertake to:

(A) Placing of Cars:

(1) Use reasonable diligence to place loaded cars promptly following arrival at destination.

(B) Removal of Cars:

(1) Carriers shall use reasonable diligence to promptly remove empty cars from point of unloading or interchange tracks of industrial plants following unloading or release by consignee or shipper, unless such empty cars are ordered or appropriated by the shipper with approval of carrier for reloading.

(2) Carriers shall use reasonable diligence to:

(a) Promptly remove outbound loaded freight cars from point of loading or interchange tracks of industrial plants following acceptance by carrier of shipping instructions; and

(b) Thereafter promptly forward such cars in line-haul service.

(3) Cars subject to Paragraphs (B) (1) and (B) (2) which are not in fact made accessible to the carrier because of the actions of the consignee or consignor, shall be deemed not to have been released until such cars are in fact made accessible to the carrier.

2. Each railroad will, with due regard for efficient railroad operating practices, hold no more cars for prospective loading at any time for any industry which it serves, than those needed to protect current requirements.

DEFINITIONS

1. *Foreign car.*—A car on a road to which it does not belong.

2. *Home road.*—The road which owns a car.

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, held at its office in Washington, D. C., on the 21st day of August 1969.

EX PARTE NO. 241

INVESTIGATION OF ADEQUACY OF RAILROAD FREIGHT CAR OWNERSHIP, CAR UTILIZATION, DISTRIBUTION, RULES AND PRACTICES

Investigation of the matters and things involved in this proceeding having been made, a hearing having been held, and the Commission, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which report and the report of the hearing examiner are made a part hereof:

It is ordered, That the respondents listed in appendix A to our order herein dated July 29, 1964, be, and they are hereby, notified and required to observe, enforce, and obey the Car Service Rules listed in appendix G to the report attached hereto.

It is further ordered, That the Car Service Rules prescribed in appendix G to the report attached hereto shall be published in the Federal Register.

It is further ordered, That each carrier listed in appendix A to our order herein dated July 29, 1964, shall collect data, as shown in appendix A to the report attached hereto to the extent necessary, during the period October 4-October 31, 1969, inclusive, and during the entire month of October of each succeeding year until further order of the Commission, for the purpose of applying the necessary data to the formula shown in appendix F to the report attached hereto.

It is further ordered, That the data collected in the next preceding paragraph, to the extent necessary for the application of the formula shown in appendix F to the report attached hereto, shall be filed with the Commission.

It is further ordered, That on or before June 30, 1970, and each succeeding year thereafter until further order of the Commission, the respondents listed in appendix A to our order herein dated July 29, 1964, shall file a report showing the results of the application of the data collected during the period October 4-October 31, 1969, inclusive, and during the entire month of October of each succeeding year thereafter until further order of the Commission, to the extent necessary, to the formula shown in appendix F to the report attached hereto and the steps taken to cure the deficiencies indicated by application of the aforesaid formula, if any, or to provide reasons why such steps were not taken.

It is further ordered, That this order shall take effect and be in force 30 days from the date of its service.

And it is further ordered, That this order shall continue in full force and effect until the further order of the Commission.

By the Commission, division 3.

ANDREW ANTHONY, JR.,
Acting Secretary.

(SEAL)

APPENDIX D

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 18th day of February 1970.

EX PARTE NO. 241

INVESTIGATION OF ADEQUACY OF RAILROAD FREIGHT CAR OWNERSHIP, CAR UTILIZATION, DISTRIBUTION, RULES AND PRACTICES

Upon consideration of the record in the above-entitled proceeding and of petitions for reconsideration, reargument and replies thereto filed by parties of record, and of:

(1) Petition of McLouth Steel Corporation, filed October 30, 1969, for leave to intervene, embracing tendered petition for clarification, modification, or reconsideration;

(2) Petition of General Mills, filed November 3, 1969, for leave to intervene, and for reconsideration, rehearing, and oral argument;

(3) Petition of Tennessee Valley Authority, filed November 3, 1969, for leave to intervene, embracing tendered petition for modification or clarification;

(4) Petition of Island Creek Coal Company, filed November 3, 1969, for leave to intervene, embracing tendered petition for clarification, modification, or reconsideration;

(5) Petition of Georgia Power Company, filed November 3, 1969, for leave to intervene, embracing tendered petition for reconsideration;

(6) Petition of Institute of Scrap Iron & Steel, Inc., filed November 3, 1969, for leave to intervene, embracing tendered petition for further hearing, modification of effective date and clarification;

(7) Petition of Pittston Clinchfield Coal Sales Corp., filed November 5, 1969, for leave to intervene, embracing tendered petition for clarification, modification, or reconsideration;

(8) Petition of Atlanta and St. Andrews Bay Railway Company, filed November 10, 1969, for leave to intervene and for acceptance of its motion for reconsideration filed October 30, 1969;

(9) Petition of Allied Chemical Corporation, filed November 17, 1969, for leave to intervene, and for reconsideration;

It appearing, That by order of November 4, 1969, the Commission, Commissioner Tuggle, postponed the effective date of the order of August 21, 1969, issued by division 3 in the above-entitled proceeding, until further order of the Commission;

It further appearing, That, except as noted below, the foregoing pleadings raise no new or material matters of fact or law not adequately considered and properly disposed of by the examiner in his report and by division 3 in its report and order (335 I.C.C. 264), and are not of such nature as to require the issuance of a report discussing the evidence in the light of the pleadings;

It further appearing, That petitioner, Atlanta and St. Andrews Bay Railway Company, contends that, among other matters, it was erroneously listed as a class I railroad in appendix A to our order entered on July 29, 1964, that on July 29, 1964, petitioner was a class I railroad and that subsequently thereto because of a reclassification, petitioner was classified as a class II railroad and continues to maintain that classification, but that no change is necessary in the requirements of the said order of July 29, 1964;

It further appearing, That in its petition for reconsideration the Bureau of Enforcement requests that notes and interpretations to rules prescribed for mandatory observance in appendix G to division 3's report be prescribed along with the rules and that such request should be granted;

It further appearing, That under certain circumstances a need for exceptions to the rules prescribed for mandatory observance in appendix G to division 3's report may occur and that agents of the Interstate Commerce Commission should be appointed to grant such exceptions;

It further appearing, That revision of the forms contained in appendix A to division 3's report which are designed to be utilized for collecting data to be used in the application of the approved formula in appendix F of that same report, as well as revision of the formula itself, for the purpose of uniformity, condensation, and simplification is advisable and necessary;

And it further appearing, That a new period for collection of data and a date for reporting the application of such data to the approved formula is necessary;

It is ordered, That petitioners not parties to the proceedings be, and they are hereby, permitted to intervene.

It is further ordered, That the Commission's applicable General Rules of Practice be, and they are hereby, waived and any of the heretofore described pleadings that are in a tendered state are hereby accepted for filing.

It is further ordered, That the conclusions and findings of division 3 in its report and order of August 21, 1969 (335 I.C.C. 264), be, and they are hereby,

modified to reflect the considerations set forth in the appearing paragraphs of this order.

It is further ordered, That the notes and interpretations to rules prescribed in appendix G starting on page 349 of the aforesaid report be made part of the rules to be observed along with the rules prescribed.

It is further ordered, That, in addition to the rules prescribed in appendix G to the aforesaid report, the following rule be, and it is hereby, prescribed:

Rule 19—Exceptions

Exceptions to the rules (prescribed by the Interstate Commeree Commission for mandatory observance) for the purpose of further improving car supply and utilization, increasing availability of cars to their owners, improving the efficiency of railroad operations, or alleviating inequities or hardships, may be authorized by the Director or Assistant Director of the Bureau of Operations, Interstate Commerce Commission, Washington, D. C.

It is further ordered, That the aforementioned Director and Assistant Director are hereby appointed agents of the Interstate Commerce Commision and vested with authority to grant exceptions to the rules prescribed in appendix G to the aforesaid report, including modifications to the rules in the subject order, for the purposes outlined in rule 19 shown in the next preceding ordering paragraph.

It is further ordered, That the aforesaid rule 19 in the second preceding ordering paragraph and our action herein in the third preceding ordering paragraph in prescribing the notes and interpretations to the rules prescribed in appendix G of the aforesaid report shall be published in the Federal Register.

It is further ordered, That the attached appendix A be substituted for appendix A to the aforesaid report

found on pages 309 through 316 and that the attached appendix F be substituted for appendix F to the aforesaid report found on pages 345-349.

It is further ordered, That each carrier listed in appendix A to our order herein dated July 29, 1964, shall collect data, as shown in substituted appendix A attached hereto during the period May 1-May 31, 1970, inclusive, and during the entire month of October of each year until further order of the Commission, for the purpose of applying such data to the formula shown in substituted appendix F attached hereto.

It is further ordered, That substituted appendix A attached hereto shall be filed with the Commission on or before the dates indicated thereon.

It is further ordered, That on or before February 1, 1971, the respondents listed in appendix A to our order herein dated July 29, 1964, shall file a report showing the results of the application of the data collected during the period May 1-May 31, 1970, inclusive, to the formula shown in substituted appendix F attached hereto and the steps taken to cure the deficiencies indicated by application of the aforesaid formula, if any, or to provide reasons why such steps were not taken.

It is further ordered, That on or before June 30, 1971, and each succeeding year thereafter until further order of the Commission, the respondents listed in appendix A to our order herein dated July 29, 1964, shall file a report showing the results of the application of the data collected during the entire month of October 1970, and each succeeding year thereafter until further order of the Commission, to the formula shown in substituted appendix F attached hereto and the steps taken to cure the deficiencies indicated by application of the aforesaid

formula, if any, or to provide reasons why such steps were not taken.

It is further ordered, That in all other respects the earlier described petitions herein be, and they are hereby, denied, for the reasons that, except as set forth herein, the findings of August 21, 1969, by the Commission, division 3, are in accordance with the evidence and the applicable law.

It is further ordered, That this order shall take effect and be in force on March 27, 1970.

It is further ordered, That this order shall continue in full force and effect until further order of the Commission and that the proceeding will be held open.

And it is further ordered, That the subject order be published in the bound volumes of the Commission's reports.

By the Commission.

H. NEIL GARSON,
Secretary.

(SEAL)

APPENDIX A

ICC USE ONLY

CARRIER NO.

INTERSTATE COMMERCE COMMISSION
WASHINGTON, D.C. 20423

EX PARTE NO. 241
ADEQUACY OF RAILROAD FREIGHT CAR OWNERSHIP
MONTH OF OCTOBER, 19__

FORM FCS-1
Budget Bureau Approval No. 80-R-0288
Car Statistics-General Service Cars

Line No.	Item	Plain Box Cars								Plain Gondolas				General Service Hoppers		General Service Flatcars		Line No.
		40' Narrow Door		40' Wide Door		50' But Under 60'		60' or Longer		Under 61'		61' or Longer						
		Home	Foreign	Home	Foreign	Home	Foreign	Home	Foreign	Home	Foreign	Home	Foreign	Home	Foreign	Home	Foreign	
	(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)	(i)	(j)	(k)	(l)	(m)	(n)	(o)	(p)	(q)	
1.	Cars Owned and Leased - October 1		xxx		xxx		xxx		xxx		xxx		xxx		xxx		xxx	1.
2.	Cars Owned and Leased - November 1		xxx		xxx		xxx		xxx		xxx		xxx		xxx		xxx	2.
3.	Average Number of Cars Owned and Leased - October*		xxx		xxx		xxx		xxx		xxx		xxx		xxx		xxx	3.
4.	Car Days of Cars Owned and Leased - October		xxx		xxx		xxx		xxx		xxx		xxx		xxx		xxx	4.
5.	Cars on Line - Bad Order - September 30																	5.
6.	Cars on Line - Bad Order - October 31																	6.
7.	Average Number of Bad Order Cars on Line																	7.
8.	Bad Order Car Days - October																	8.
	Cars Loaded on Line and Loaded Cars Received from Connections																	
9.	Local																	9.
10.	Interline Forwarded																	10.
11.	Interline Received																	11.
12.	Bridged																	12.
13.	Total																	13.
	Detail of Car Days																	
14.	System Car Days off Line		xxx		xxx		xxx		xxx		xxx		xxx		xxx		xxx	14.
15.	Foreign Car Days on Line	xxx		xxx		xxx		xxx		xxx		xxx		xxx		xxx		15.
16.	Switch and Other Reclaim Days Paid																	16.
17.	Switch and Other Reclaim Days Received																	17.
18.	Rule 22 Reclaim Days Paid																	18.
19.	Rule 22 Reclaim Days Received																	19.
20.	"No Day" Car Days																	20.

	Other Car Statistics (a)	Total (b & c)	Total (d & e)	Total (f & g)	Total (h & i)	Total (j & k)	Total (l & m)	Total (n & o)	Total (p & q)	
21.	Turnaround Time of Local Cars									21.
22.	No. of Cars Studied to Determine Turnaround Time									22.
23.	Average Days Per Car Loaded and Delivered to Connections									23.
24.	No. of Cars Studied to Develop Average in Line 23									24.
25.	Average Daily Unfilled Orders - For Local Service									25.
26.	Average Daily Unfilled Orders - For Interline Service									26.
27.	Average Daily Cars in Excess of Orders									27.

I certify that to the best of my knowledge the above data are correct.

NAME _____

Title _____ DATE _____ 19__

REPORTING RAILROAD _____

APPENDIX F

ICC USE ONLY
CARRIER NO.

INTERSTATE COMMERCE COMMISSION
WASHINGTON, D.C. 20423

FORM FCS-2

EX PARTE NO. 241
Formula For Determining Freight Car Ownership Requirements
Month of October_____

Budget Bureau Approval No. 80 R-0388
Type of Car_____

Line No.	Item	Source	Individual Railroad	US Totals	Line No.
1	Tota. Serviceable Local Car Days	Form FCS-1 (Line 9 Home & Foreign) multiplied by line 21)			1
2	Total Serviceable Interline Car Days	Form FCS-2 (Line 3 minus line 1)		xxx	2
3	Total Serviceable Local & Interline Car Days Including Reclass Adjustment	Form FCS-1 (Line 15 minus line 16 plus line 4 plus line 16 plus line 18 minus line 17 minus line 19 minus line 20)		xxx	3
4	"No Day" Car Days	Form FCS-1 (Line 20)			4
5	Total Serviceable Interline Car Days Adjusted for "No Day" Car Days	Line 2 plus line 4			5[1]
6	Each Road's Percentage of Interline Car Days Adjusted for "No Day" Car Days	Line 5 divided by U.S. Total		100.000	6
7	Each Road's Serviceable Interline Car Days After Adjustment for "No Day" Car Days	Line 2 (U.S. Total) multiplied by line 6 (Individual Railroads)		xxx	7
8	Obligation to Protect Local Traffic	Line 1 divided by 21 days		xxx	8
9	Obligation to Protect Interline Traffic	Line 7 divided by 21 days			9
10	Total Obligation to Protect Local and Interline Traffic	Line 8 plus line 9		xxx	10
11	Serviceable Ownership (November 1)	Form FCS-1 (Line 2 minus line 6)		xxx	11
	Car Service Rules Observance Credit				
12	Average Number of Foreign Cars Loaded and Delivered to Connections Daily	Form FCS-1 (Line 10 [illegible] divided by 21)		xxx	12
13	Percent of Car Service Rules Observance	Assumptions of American Railroads		xxx	13
14	Number of Foreign Cars Credited Daily as Loaded in Accordance with Car Service Rules	Line 12 multiplied by line 13		xxx	14
15	Serviceable Car Days For Car Loaded and Delivered to Connections	Form FCS-1 (Line 22)		xxx	15
16	Serviceable Ownership Reduction Due to Car Service Rules Observance Credit	Line 14 multiplied by line 15			16
17	Serviceable Interline Ownership Obligation After Allowing Car Service Rule Credit	Line 9 minus line 16			17
18	Percent of Each Road's Obligation to the Total Serviceable Interline Fleet After Allowing Car Service Rules Credit	Line 17 divided by U.S. Total		100.000	18
19	Interline Obligation After Car Service Rules Credit	Line 9 (U.S. Total) multiplied by line 18 (Individual Railroads)			19[2]
	Cars Needed to Protect Local and Interline Shortages				
20	Average Daily Unfilled Orders-Local Service	Form FCS-1 (Line 24)		xxx	20
21	Average Daily Unfilled Orders-Interline Service	Form FCS-1 (Line 24)			21
22	Serviceable Cars Required to Protect Potential Local Loading	1/3 of Line 20 multiplied by Form FCS-1 (Line 21)		xxx	22
23	Total Cars Loaded and Delivered to Connections	Form FCS-1 (Line 10 Home & Foreign)			23
24	National Average Serviceable Car Days Per Car	Line 2 divided by line 23 (U.S. Total)	xxx		24[3]
25	Total Cars Needed to Protect Interline Shortages	Line 21 multiplied by line 24 (U.S. Total)	xxx		25
26	Each Road's Requirement to Protect Potential Interline Originations	1/3 of Line 21 multiplied by line 19			26
27	Remaining Requirement to Protect Potential Interline Use	Line 25 minus line 26 (U.S. Total)	xxx		27
28	Each Road's Requirement to Protect Potential Interline Use	1/3 of Line 27 (U.S. Total) multiplied by line 6 (Individual Railroad)		xxx	28
29	Each Road's Requirement to Protect Potential Interline Originations and Use	Line 26 plus line 28		xxx	29
30	Total Obligation to Protect All Traffic	Line 8 plus line 10 plus line 22 plus line 29		xxx	30
31	Excess or Deficit of Ownership	Line 30 minus line 11		Deficit	31
				Excess	

United States Totals Shall be Provided to Individual Railroads for the Following Items.

Line No. 2—Total Serviceable Interline Car Days
Line No. 6—"No Day" Car Days
Line No. 9—Obligation to Protect Interline Traffic
Line No. 13—Percent of Car Service Rules Observance
Line No. 16—Serviceable Ownership Reduction Due to Car Service Rules Observance Credit
Line No. 17—Serviceable Interline Ownership Obligation After Allowing Car Service Rule Credit
Line No. 21—Average Daily Unfilled Orders-Interline Service
Line No. 23—Total Cars Loaded and Delivered to Connections
Line No. 25—Total Cars Needed to Protect Interline Shortages
Line No. 26—Each Roads Requirement to Protect Potential Interline Originations

[1] Sum of Line 2 plus line 4
[2] Sum of Line 16 plus line 17
[3] Line 2 divided by line 23

Prepared By:_____

Title_____ Date_____, 19__

Reporting Railroad_____

EX PARTE NO. 241, INVESTIGATION OF ADEQUACY OF RAILROAD FREIGHT CAR OWNERSHIP

GENERAL INSTRUCTIONS

The information for this study should be collected and reported for the month of October (October 1 to October 31, 1970) and each October thereafter until further notice of the Commission. The information is to be reported by Class I Line-Haul Railroads, Class II Line-Haul Railroads, and Switching & Terminal Companies.

COMPLETION OF FORM

The data sheet is to be completed by each railroad in accordance with the instructions and mailed to the Director, Bureau of Accounts, Interstate Commerce Commission, Washington, D.C. 20423, as soon as completed but no later than December 31 of each year. Each reporting railroad must maintain and have available for inspection adequate records to substantiate all items of data reported. These records shall be retained at least 2 years from the date of the reporting period.

TYPES OF REVENUE CARS TO BE REPORTED

The data to be reported shall be for general purpose cars only as shown below:

PLAIN BOX CARS - XM,XMI,XMIH,VA,VM,XC,XCI,XU

40' Narrow Door	B100,101,105,106,110,111,115,116,120,121,125,126,040,050,060,070,080
40' Wide Door	B102,103,104,107,108,109,112,113,114,117,118,119,122,123,124,127,128,129
50'	B200-209,210-219,220-229
61' and Over	B300-309,310-319,320-329

PLAIN GONDOLAS - GA,GB,GD,GH,GRA,GT,GS

Under 61'	G101,102,201,202,301,302,111,112,211,212,311,312,121,122,221,222,321,322, 131,132,231,232,331,332,141,142,241,242,341,342,151,152,251,252,351,352, 161,162,261,262,361,362,171,172,271,272,371,372,181,182,281,282,381,382, 091,092,291,292,391,392
61' and Over	G401,402,411,412,421,422,431,432,441,442,451,452,461,462,471,472,481,482, 491,492

HOPPERS - HD,HE,HFA,HK,HM,HT,HTA,HTC

General Service	H100,200,300,110,210,310,120,220,320,130,230,330,140,240,340,150,250,350, 160,260,360,170,270,370

FLAT - FM

General Service	F101-109,201-209

SPECIFIC INSTRUCTIONS

All statistics reported must be supported by actual records. If there are no data to be reported for a particular item, leave the space blank. Do not insert dashes or zeroes. All data are to be reported for Home and Foreign cars as indicated on the data sheet.

Line No. 1 and Line No. 2 - CARS OWNED AND LEASED

This information will be the same as that reported to the Association of American Railroads on their Form CS-11, Col. (A) for the first of the month, October 1 and November 1.

Line No. 3 - AVERAGE NUMBER OF CARS OWNED AND LEASED - OCTOBER

This figure is developed by adding lines 1 and 2 and dividing by 2 to arrive at the average number of cars owned and leased during the month.

Line No. 4 - CAR DAYS OF CARS OWNED AND LEASED - OCTOBER

This figure is developed by multiplying the average number of cars shown in line No. 3 by the number of days in the month (31).

Line No. 5 and Line No. 6 - CARS ON LINE - BAD ORDER - END OF MONTH PRECEDING STUDY AND END OF MONTH OF STUDY

This information will be the same as that reported to the Association of American Railroads on their Form CS-60, Col. (6) which is for the end of a month, September 30 and October 31.

SPECIFIC INSTRUCTIONS–Continued

Line No. 7 - AVERAGE NUMBER OF BAD ORDER CARS ON LINE - OCTOBER
This figure is developed by adding lines 5 and 6 and dividing the result by 2 to arrive at the average number of owned and leased cars which are bad order during the month.

Line No. 8 - BAD ORDER CAR DAYS ON LINE - OCTOBER
This figure is developed by multiplying the result shown in line No. 7 (Home and Foreign) by the number of days in the month (31).

CARS LOADED ON LINE AND LOADED CARS RECEIVED FROM CONNECTIONS

Line No. 9 - LOCAL
Report all cars, Home and Foreign, that originated on your line during the month and terminated on your line.

Line No. 10 - INTERLINE FORWARDED
Report all cars, Home and Foreign, that originated on your line during the month and were delivered to connections in interline service.

Line No. 9 - LOCAL and Line No. 10 - INTERLINE FORWARDED
The following interpretations of switching services are provided for your guidance:
"Line-Haul Cars Handled in Switching Service":
Cars loaded in switching service for initial road-haul movement by connection to be reported by the road-haul carriers performing the billing of cars.

"Cars Handled in Intra and Inter-terminal Switching":
Cars loaded for intra-terminal or inter-terminal switch movement only (no road-haul) to be reported by the loading road if load terminates on loading road or as interline forwarded if for unloading on a connecting line.

Line No. 11 - INTERLINE RECEIVED
Report all cars, Home and Foreign, received loaded during the month in interline service from connections and terminated on your line.

Line No. 12 - BRIDGED
Report all cars, Home and Foreign, that were received loaded during the month in interline service from connections and delivered to connecting lines.

Line No. 13 - TOTAL
This figure represents the sum of lines 9,10,11 and 12.

DETAIL OF CAR DAYS

ADJUSTMENTS: Car days shall be reported for the month of October as evidenced by the Per Diem Report. Adjustments of System Car Days Off Line, Foreign Car Days on Line and Reclaim Days Paid and Received shall be forwarded to the Commission, after such adjustments are determined. This adjustment shall include all items reported by your road for the months of November, December, and January with an estimate of System Car Days Off Line and Foreign Car Days on Line that will be settled through the Per Diem Discrepancy Claim Procedure. This adjustment must be filed with the Commission no later than March 31.

Line No. 14 - SYSTEM CAR DAYS OFF LINE
Report the number of car days reported to owner by user roads for the month of October in the October Per Diem Report. See note regarding adjustments.

Line No. 15 - FOREIGN CAR DAYS ON LINE
Report car days reported by user roads to car owner for the month of October in the October Per Diem Report. See note regarding adjustments.

Line No. 16 - SWITCH AND OTHER RECLAIM DAYS PAID
Report the number of days paid to the user of your cars under the reclaim agreement during the month. See note regarding adjustments.

DETAIL OF CAR DAYS - Continued

Line No. 17 - SWITCH AND OTHER RECLAIM DAYS RECEIVED

Report the number days received from owners of cars under the reclaim agreement during the month. See note regarding adjustments.

Line No. 18 - RULE 22 RECLAIM DAYS PAID

Report the number of days paid to the user of your cars under the reclaim agreement during the month. See note regarding adjustments.

Line No. 19 - RULE 22 RECLAIM DAYS RECEIVED

Report the number of days received from owners of cars under the reclaim agreement during the month. See note regarding adjustments.

Line No. 20 - "NO DAY" CAR DAYS

Report all "No Day" car days based on all cars that are received after 12:01 a.m. and delivered off line prior to 11:59 p.m. on the same calendar day. Car days reported represent the total car hours during the month accumulated by each car type divided by 24.

OTHER CAR STATISTICS

Line No. 21 - TURNAROUND TIME OF LOCAL CARS

Car days used to develop turnaround time of cars used in local service to be calculated from date of loading to date of next loading (extending into November, if applicable) with a maximum of 31 days for any one car. Cars loaded in local service and not reloaded but delivered empty to connecting line will not be used in determining local turnaround time.

Line No. 22 - NUMBER OF CARS STUDIED TO DETERMINE TURNAROUND TIME

Report the number of cars used in determining the local turnaround time as reported in line No. 21. The reporting road should be satisfied the number of cars studied is sufficient to represent local turnaround.

Line No. 23 - AVERAGE DAYS PER CAR LOADED AND DELIVERED TO CONNECTIONS

Car days used to develop average to be calculated from date of release empty from previous load or receipt empty in interchange to time of delivery of loaded car off line (using September or November records if necessary) with a maximum of 31 days for any one car.

Line No. 24 - NUMBER OF CARS STUDIED TO DEVELOP AVERAGE AS SHOWN IN LINE 23

Reporting road should be satisfied the number of cars studied is sufficient to represent car days per car in interline forwarded service.

Lines Nos. 25 and 26 - AVERAGE DAILY UNFILLED ORDERS - FOR LOCAL SERVICE & AVERAGE DAILY UNFILLED ORDERS - FOR INTERLINE SERVICE

Local and interline seperation of total average daily unfilled orders for each required car type should be developed from individual carrier's records if available; otherwise, distributed in the same proportion as the ratio between local and interline forwarded loadings as reported in lines Nos. 9 and 10. The average daily unfilled orders shown is to be reported in conformity with instructions on AAR Form CS-44 (Revised 7/1/69). The average daily for the month will be the sum of the weeks divided by 4.

Line No. 27 - AVERAGE DAILY CARS IN EXCESS OF ORDERS

Average daily cars in excess of orders should be reported in conformity with instructions on AAR Form CS-44 (Revised 7/1/69). The average daily for the month will be the sum of the weeks divided by 4.

APPENDIX E

ORDER

Service Date
March 19, 1970

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 18th day of March, 1970.

EX PARTE NO. 241

INVESTIGATION OF ADEQUACY OF RAILROAD FREIGHT CAR OWNERSHIP, CAR UTILIZATION, DISTRIBUTION, RULES AND PRACTICES

Upon consideration of the record in the above-entitled proceeding, including the report of Division 3, 335 I.C.C. 264, prescribing car service rules and other matters set forth in the appendices to that report; the order of the entire Commission, served February 25, 1970, modifying the said rules and other matters in certain respects, and setting the date for compliance with the requirements of said order as March 27, 1970; the petition of the Association of American Railroads (on behalf of the respondents) (Association) filed on March 17, 1970, seeking postponement of the effective date solely with Respect to Rules 1 and 2 set forth in Appendix G to the said report, until July 1, 1970; the telegraphic request of The Procter & Gamble Company in support of the Association; the petition of National Industrial Traffic League (NITL) for leave to file, and a petition to stay or postpone the effective date of the order served February 25, 1970, for at least 60 days beyond March 27, 1970, filed on March 17, 1970; the telegraphic request of the National Association of Shippers Advis-

tory Boards for postponement of the effective date until after the effective date of the order entered in *Chicago, B. & Q. R. Co.* v. *New York, S. & Western R. Co.*, 332 I.C.C. 176, filed March 13, 1970; the petition of the New Orleans Traffic and Transportation Bureau for postponement until at least 60 days beyond March 27, 1970, filed March 17, 1970; and the petition of Louisville and Nashville Railroad Company (L&N), the Chesapeake and Ohio Railway Company (C&O), the Baltimore and Ohio Railroad Company (B&O), and Norfolk and Western Railway Company (N&W), for postponement of the effective date of the order served February 25, 1970, for an unspecified period beyond March 27, 1970, filed on March 15, 1970; and

It appearing, That in seeking the postponement, the Association refers to the complexities of the specified Rules 1 and 2 in relation to actual operations, the variety of interpretations of those rules urged by members of the shipping public, and fears of the latter that application of the rules would adversely affect the orderly production and marketing of their products;

It further appearing, That the Association will seek to obtain maximum possible compliance with the said rules, so that all interested and affected parties may better judge the effect of mandatory application;

It further appearing, That the Association agrees that it will report to this Commission at the end of each 30 days concerning the results of its efforts to obtain maximum possible compliance;

It further appearing, That, in seeking postponement of all of the rules prescribed, the NITL, the National Association of Shippers Advisory Boards, and the New Orleans Traffic and Transportation Bureau, in substance, emphasize that additional time is

necessary to explore ways and means of removing the confusion and uncertainty surrounding mandatory application of the rules;

And it further appearing, That, in seeking postponement of all the rules prescribed, the L&N, C&O, B&O, and N&W, in substance, emphasize that additional time is needed to analyze the extent of the modifications and changes made in the report of Division 3, 335 I.C.C. 264, by the order of the Commission served February 25, 1970;

Wherefore, and for good cause shown:

It is ordered, That since the petition of the National Industrial Traffic League for stay or postponement of the effective date was seasonably filed, no action need be taken on its petition for leave to file;

It is further ordered, That, to the extent the petitioners seek postponement of the effective date of the terms of the order served February 25, 1970, with respect to Rules 1 and 2 specified above, the petitions be, and they are hereby, granted, and in all other respects, the petitions be, and they are hereby, denied;

It is further ordered, That, solely with respect to Rules 1 and 2 of Appendix G to the report of Division 3, as modified by the order of the Commission served February 25, 1970, the date for complying with the terms of the order served February 25, 1970, in this proceeding be, and it is hereby, postponed until July 1, 1970; with no further change in the said order.

And it is further ordered, That the Association be, and it is hereby, required to file with this Commission on April 20, 1970, May 20, 1970, and June 19, 1970, a report setting forth the results of its efforts to obtain maximum possible compliance with Rules 1 and 2 prescribed in Appendix G of the report of Divi-

sion 3, as modified by the order of the Commission served February 25, 1970, including a showing of the effect of compliance with the said order upon the carriers, shippers, and other parties of interest.

By the Commission.

H. NEIL GARSON,
Secretary

(SEAL)

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

No. 70-182-Civ-J

[Filed June 7, 1971, Jacksonville, Fla.]

FLORIDA EAST COAST RAILWAY COMPANY, a corporation, PLAINTIFF

and

SOUTHERN PACIFIC TRANSPORTATION COMPANY, a corporation, NORTHWESTERN PACIFIC RAILROAD COMPANY, a corporation, and SAN DIEGO & ARIZONA EASTERN RAILWAY COMPANY, a corporation, INTERVENING PLAINTIFFS

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, DEFENDANTS

MEMORANDUM OPINION AND FINAL JUDGMENT

Before SIMPSON, Circuit Judge, and SCOTT and TJOFLAT, District Judges.

SIMPSON, Circuit Judge:

This action was brought by Florida East Coast Railway Company (FEC) supported by the intervening lines (Southern Pacific or Southern Pacific Group) under Title 28, U.S.C., Sections 2321-2325 and 2284, to enjoin, annul, and set aside orders of the Interstate Commerce Commission (ICC or Com-

mission) which require the railroads, in accordance with an ICC-imposed formula, to file annual reports concerning their respective ownership of general purpose freight cars and to observe mandatory freight car service rules. The orders are based on investigations by the Commission in Commission docket number Ex Parte No. 241, styled *Investigation of Adequacies of Railroad Freight Car Ownership, Car Utilization, Distribution, Rules and Practice.* The proceedings before the Commission are reported at 335 I.C.C. 264, modified in 335 I.C.C. 874.

The Florida East Coast Railway Company (FEC) commenced this action by a complaint which attacks both the car ownership formula upon which the affected railroads are required to submit information to the Commission and the imposition of the mandatory car service rules. The Southern Pacific Group of railroads intervened as plaintiffs in the case and also attack both the car ownership formula and the mandatory car service rules as an arbitrary and capricious exercise of Commission power.

For years the Commission has been concerned with recurring complaints by shippers and Congress that there existed a national shortage of railroad freight cars. See, e.g., 268 I.C.C. 687 (1947). Early in the Commission's investigation it concluded that the problem would best be solved by committing it to the sound discretion of the management of the various railroads. In the early 1960's however, as the problem continued to be acute, the Commission issued its order July 29, 1964, in Docket Number 241, supra, to obtain detailed information regarding car ownership, utilization, distribution, rules, and practices which might bear on the alleged railroad car shortage. The railroads were ordered to file the requested information on forms provided by the Com-

mission. The evidence was submitted to the Commission in the form of these reports, verified statements of the railroads and shippers, and in an evidentiary hearing before a hearing examiner, requiring 50 hearing days to receive testimony and 120 Exhibits, and resulting in a transcript running to 5804 pages. On January 23, 1968, the hearing examiner filed his report asserting that the record did not contain competent evidence upon which to base a conclusion as to the adequacy of freight car ownership, and that the adoption of car ownership formula and car service rules had not been shown by the record to be justified.

Exceptions were filed to the hearing examiner's report, and Division 3 of the Commission overruled the hearing examiner, finding from the evidence adduced and official notice taken of congressional hearings, as well as from complaints to the Commission by shippers and studies inside and outside the Commission, that rail car shortages were largely the result of inadequacies in the ownership and utilization of freight cars. 335 I.C.C. 308-309. Division 3 for the Commission adopted a car ownership formula by which the railroads were to help assess the adequacy of the number of cars owned by each railroad. Each railroad was ordered to submit to the Commission reports showing the application of the adopted formula, and to report to the Commission what steps had been taken to cure the deficiencies indicated by the application of the formula, if any, or to provide reasons why such steps were not taken. The Commission also ordered that Car Service Rules 1, 2, 7, 15, 16, 17 and 18, which had earlier been adopted by the American Association of Railroads for voluntary observance, be made mandatory on the railroads.

On review of the action of Division 3 by the entire Commission, the Division decision was affirmed with Rule 19 (which prescribes the procedure for obtaining exceptions to the car service rules) also made mandatory. In other respects the full Commission affirmed the Division action. The Commission made July 1, 1970, the effective date for complying with the orders.

FEC filed its complaint on April 8, 1970. On June 5, 1970, the United States and the Commission filed a motion to dismiss the FEC complaint on grounds of lack of jurisdiction over the subject matter and of failure of the complaint to state a claim upon which relief could be granted. Southern Pacific then on June 22, 1970, moved to intervene and filed a motion for temporary restraining order against the car service rules portion of the Commission's order. On June 24, 1970, a temporary restraining order was issued by a single judge of this court preventing enforcement of Car Service Rules 1 and 2 pending adjudication of the merits by this court.[1] The government's motion to dismiss the action was deferred by the single judge for consideration by the full three-judge panel.[2]

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[1] On May 12, 1971, while the case was under submission to the court, pursuant to a motion by FEC a member of this court also granted a temporary restraining order staying the enforcement of the Commission order requiring the FEC to submit data to the Commission in accordance with the car ownership formula pending hearing by the full court on the merits of the cause. At oral argument counsel agreed that both temporary stays should continue in force pending our decision on the merits.

[2] This opinion and our order are based on the record before us and not on outside material, but we note that a recent book critical of the ICC, entitled *The Interstate Commerce Omission*, authored by the Ralph Nader Study Group, con-

THE CAR OWNERSHIP FORMULA

The formula approved by the Commission is an interline car-day formula. The formula contemplates that the car ownership requirements of the railroads will be determined by (1) computing the number of serviceable cars required to protect traffic actually carried by dividing serviceable car-days of cars on line by the number of days in October, the computation period; (2) computing the number of serviceable cars required to protect shortages by multiplying the reported shortages in October (reduced by 50%) allocated between local and interline on the basis of car loadings by the computed local turnaround time (serviceable car-days divided by carloads originated in local service) and by the national average turnaround time for interline service; and (3) computing the effect of the credit allowed to railroads loading foreign cars in October for interline movement.

It is the position of FEC that the car ownership formula is arbitrary and capricious as applied to the FEC, and discriminates against the FEC because of its position as a terminating line. As a stub end road running the length of the Florida peninsula along the east coast from Jacksonville to Miami, FEC terminates substantially more carloads of interline freight than it originates. This FEC area originates mainly fruit and vegetable shipments, handled by refrigerated cars and does not produce a substantial volume of traffic involving products capable of loading into

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tains a chapter dealing with alleged boxcar shortages. For further insight into the boxcar shortage controversy, reference may be made to an opinion rendered by a three-judge court of this district in a companion case, *Florida East Coast Railway Company* v. *United States and Interstate Commerce Commission*, 322 F.Supp. 725 (Feb. 18, 1971).

ordinary boxcars, the type of cars mainly used for the shipment of commodities into Florida. As a consequence FEC claims that it is habitually burdened with a substantial excess of foreign freight cars over the number required for loadings.

FEC states that while the Commission did not admit into evidence at the hearing any data applying the formula to particular railroads, independent study by the American Association of Railroads indicates that application of the formula to FEC will result in a finding that FEC has a car ownership shortage of some 2,053 freight cars. FEC contends that its purchase of these additional cars would require an expenditure in excess of 28 million dollars.

The crux of FEC's complaint is then that the formula as presently approved is arbitrary because it fails to take into consideration the special operational problems of a terminating railroad. FEC contends that the application of this formula will result in a completely unwarranted but predictable finding that the FEC is deficient in the ownership of railroad freight cars, and that the FEC will then be required to expend millions of dollars for cars which it cannot load and for traffic in which it cannot participate. FEC contends for example that the major freight car shortages occur in October when the West and Midwest grain harvests take place. FEC notes that Florida produces little grain which is loaded into general purpose freight cars, and that little grain from the West and Midwest is shipped over FEC lines for export, consumption or processing. FEC further points out that it does not participate in the shipment of coal, another industry which the Commission cited as suffering from a car shortage. The FEC states moreover that it will be totally unable, as a terminating line (as opposed to an essentially originating line) to

load with freight for out shipment the cars which the present formula will require it to purchase. The further argument goes that under the companion mandatory car service rules to be discussed infra, the FEC will not be able to require that the other railroads accept empty FEC cars for loading. Thus FEC argues that the mandatory car service rules further complicate the problem. FEC lastly contends that because of the peculiar application of the formula definitions of "serviceable car-days" and "turnaround time" to a terminating line, the FEC's inability to load the cars will result in an even greater showing of deficiency under the formula here attacked. This is said to point up the ludicrous nature of the formula since in this instance the fewer cars the FEC uses, the more cars the formula will operate to require it to purchase. These factors are the principal bases from which FEC argues that the formula is arbitrary and unreasonable in that it will result in a required purchase of millions of dollars of unneeded and unusable freight cars.

FEC also urges that the action of the Commission in reversing the examiner was based on matters outside the record which FEC had no opportunity to contest or cross-examine. This argument is bottomed largely upon this statement in the Commission order at 335 I.C.C. 308:

> From the evidence adduced, and official notice taken from Congressional hearings, numerous complaints by shippers to the Commission, and numerous studies made in and outside the Commission, we are convinced that there is a continuing freight car shortage which requires affirmative remedial action at this time. We believe that this situation results from a combination of inadequate ownership of general purpose

type freight cars by respondents as a group, and improper utilization of the available freight car fleet.

FEC contends that it has no way to ascertain from this Commission statement what materials were the subject of Commission notice, and further that it was given no opportunity to rebut the materials, in the face of the requirement of the Administrative Procedure Act that where rule-making is involved a party is entitled to an opportunity to rebut materials of which official notice is taken. Title 5, U.S.C., Section 556(d).

On oral argument counsel for the Commission placed this action in perspective by pointing out that the Commission proceeding under review in this action is one of a number of related proceedings in which the Commission has attacked the problems of car supply and distribution. We were referred to Commission hearings on basic car per diems, Docket Number 31,358, found at 332 I.C.C. 176. The ICC order was upheld by two 3-judge courts: *Union Pacific Railroad Co.* v. *United States*, D.Neb. 1969, 300 F. Supp. 319, and *Boston & Maine Railroad* v. *United States*, D. Mass. 1969, 297 F. Supp. 615. Both decisions were affirmed by the United States Supreme Court at 396 U.S. 27, 90 S.Ct. 196, 24 L.Ed.2d 142. Commission proceedings were also held relative to the imposition of the incentive car per diems, Docket Number 252, Sub 1, 337 I.C.C. 217, in response to the 1966 Congressional amendment to Section 114 of the Interstate Commerce Act. That proceeding was attacked and held invalid in a companion case before this Court. See footnote 2. A 3-judge statutory court of the Eastern District of New York reached the opposite conclusion in *Long Island R. R. Co.* v. *USA*

and ICC, 318 F.Supp. 490. *Long Island* was not appealed but the Middle District of Florida case is presently on appeal to the Supreme Court. A third proceeding involved Commission action to require consignees to clear and clean cars properly after use. This Commission directive is under attack in the district court for the District of Minnesota, in a case styled *Staley Manufacturing Company* v. *United States and Interstate Commerce Commission*, 4-69-Civ-459. The Commission in the past several years has also entered numerous Car Service orders dealing with specific emergency situations which were from time to time found to exist.

We agree with Commission counsel that it should have been obvious to all the affected railroads and to all others involved in the proceedings under review that the "numerous studies" referred to in the Commission order related to these other proceedings being conducted by the Commission, aimed at other aspects of the car shortage problem. The Commission citation of these other proceedings was merely additional support for a proposition which already is clear in this record; that is, the United States has long suffered from a shortage of railroad freight cars. The numerous Commission proceedings directed at alleviating or correcting the freight car shortage were common knowledge in the railroad industry.

The FEC argument that they were prejudiced by the Commission reference to some mysterious source which evades the FEC is found to be not meritorious.

The record indicates that the Commission's Bureau of Accounts and its Bureau of Inquiry and Compliance (whose title was later changed to Bureau of Enforcement) understood and urged that the present formula might work a hardship on terminating lines. The Bureaus' brief to the Commission stated:

> Implementation of an interline car-day theory of ownership responsibility would require railroads whose interline traffic is predominantly terminations or overhead to increase their ownership in excess of their originations and would probably require some centralized national control of distribution, perhaps as firm and arbitrary as that employed by the Director General in distributing the national pool under World War I to assure equitable utilization of the excess ownership. (Bureau brief p. 51)

FEC contends that despite this warning the Commission failed to make adequate provision for the plight of the terminating railroad. Instead, the FEC charges that the Commission in attempting to remedy the Bureau's objection adopted a patently discriminatory "car service compliance credit" that further penalizes the FEC by imposing additional car ownership requirements because of the inability of the FEC to load empty foreign cars on its line.

In instituting the interline formula the Commission found:

> Both the Bureau of Accounts and the AAR directors advocate use of a so-called interline car-day formula which, in addition to providing sufficient ownership to protect a carrier's origination in local service, would insure that each railroad owns cars in numbers equal to its proportionate use of the national fleet in interline service. It is concluded that this type formula is equitable because interline service is a profit venture in which all roads participate to the extent of their proportionate use of the freight car fleet. Since an interline formula will be the most equitable means of establishing car ownership require-

> ments, we shall give no further consideration to the formula designed by the Bureau of Accounts which is based mainly on loads originated and which is shown in appendix D to the examiner's report. (335 I.C.C. at 304-05)

FEC argues however that the Commission's findings are without support in the record, contending that the approved formula does not insure that each railroad will own cars in numbers equal to its proportionate use of the national fleet in interline service. Rather, they say, the terms of the credit provision of the formula insure that terminating lines will supply a disproportionate share of the freight cars used.[3]

The Commission replies to all of this by requesting the court to dismiss the action for lack of ripeness. The Commission charges that at this time the formula is in a tentative and experimental stage without any substantial impact on the railroads. The ICC argues that for the present it considers the formula simply a rough guideline to the railroads of what the Commission believes each railroad's ownership requirements should be, and that neither FEC nor any other line has been actually ordered to purchase a single freight car in accordance with the formula. At this stage ICC says it merely requires that the railroads supply data showing hypothetical application of the formula, not dissimilar to information which the railroads are now supplying to the American Association of Railroads. Commission counsel on brief and in oral argument asserts that the Commission recognizes

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[3] FEC's apparent position is that any formula designed by the Commission for measuring freight car shortage of respective lines should be based primarily on the number of freight loads originated on each line.

imperfections in the present formula and that further modifications will likely be necessary and further studies required before settling on a formula equitable in application to all railroads. Since the formula may be expected to undergo substantial changes before it is adopted in final form and because no purchases of railroad cars by any line in accordance with any formula have yet been required, ICC asserts that the lack of administrative finality renders the controversy not yet ripe for judicial intervention.

The FEC replies that *Frozen Food Express* v. *United States*, 1956, 351 U.S. 40, 76 S.Ct. 574, 100 L.Ed. 917, is conclusive authority for the proposition that the Commission's action with respect to the car ownership formula is now ripe for adjudication under Section 17(9) of the Interstate Commerce Act, Title 49, U.S.C., Section 17(9).

We think, however, that the FEC misapplies the holding of *Frozen Foods Express*. There the holding by the Court was that a finding by the Commission that a commodity was not an exempt agricultural product had "immediate and practical impact" on carriers who were transporting the commodity because transportation of such commodity without Commission approval subjected the carrier to a broad assortment of sanctions. As explicated above, the order in Docket 241 presently requires no more than that the railroads file reports in accordance with the approved formula. Beyond cavil the Commission has the authority to require the filing of such reports under the provisions of Section 20(1) of the Interstate Commerce Act, Title 49, U.S.C. Section 20(1) which reads:

> "The Commission is hereby authorized to require annual, periodical, or special reports from

carriers, lessors, and associations (as defined in this section), to prescribe the manner and form in which such reports shall be made, and to require from such carriers, lessors, and associations specific and full, true, and correct answers to all questions upon which the Commission may deem information to be necessary, * * *"

The carrier railroads at this time suffer no "immediate and practical impact" from the order apart from being required to file reports within the scope of Commission authority under the statute. This case more nearly partakes of the nature of a case distinguished in *Frozen Foods: United States* v. *Los Angeles R. Co.*, 1927, 273 U.S. 299, 47 S.Ct. 413, 71 L.Ed. 651. In *Los Angeles R. Co.* the Supreme Court held nonreviewable a Commission report which "might never be the basis for a proceeding before the Court". This latter statement is strikingly reminiscent of the case at hand, where the Commission acknowledges that its provisional formula is less than perfect and may require modification to meet the objections of particular carriers. It is conceivable that the formula in its present state will never be the basis for a Commission order actually to purchase freight cars. Our mission as an Article III court is to decide actual cases or controversies, not potential cases or controversies. We should not decide cases where the orders of the Commission have no "immediate and practical impact" on the carrier, and where further action within the agency might avoid the predicted dispute altogether. We find nothing in *Columbia Broadcasting System* v. *United States*, 1942, 316 U.S. 407, 62 S.Ct. 1194, 86 L.Ed. 1563, and *Gardner* v. *Toilet Goods Association*, 1967, 387 U.S. 167, 87 S.Ct. 1526, 18 L.Ed.2d 704, which is inconsistent with this conclusion. We there-

fore find that the agency action lacks the degree of finality requisite to judicial review and accordingly grant the motion of the United States and the Commission to dismiss this action insofar as it relates to the car ownership formula, without prejudice to the right of FEC or the Southern Pacific Group to seek relief in court at such time as an actual controversy has ripened.

MANDATORY CAR SERVICE RULES

In this portion of the suit the FEC and the Southern Pacific Group attack the imposition of mandatory car service rules as being without sufficient support in the record.[4] The Commission contests this assertion, and we find no basis for us to set aside the action of the Commission in requiring mandatory observance of the car service rules already in effect by voluntary agreement.

Car service rules were not invented by the Commission. They were initially devised by the railroads' trade organization, the Association of American Railroads, to secure the prompt and expeditious use of freight cars. There was a dispute at oral argument between opposing counsel as to the extent to which the railroads were bound by the rules promulgated by the

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[4] Although the plaintiff and intervenors challenge all of the mandatory car service rules, on brief and at oral argument their attention focused almost entirely on Car Service Rules 1 and 2. Car Service Rule 1 provides generally that cars of other ownership in possession of a railroad at a junction or common point with the owner must be delivered empty to the owner, or shall be loaded at that point to or via the owner's line. Car Service Rule 2 applies to foreign cars which are unloaded elsewhere and provides that the foreign car shall either be returned empty to the owner, delivered empty to the road from which the car was received under load, or may be loaded to or via the owner's line.

Association of American Railroads, but it seems to us clear that the railroads entered into an agreement to abide by and to enforce the car service rules.

The Commission contends that if the railroads had only lived up to their agreement to operate in accordance with the voluntary car service rules, further Commission action in this regard would be unnecessary. However, the Commission contends that the rules were observed more in the breach than in the compliance. Hence the Commission contends that the mandate to observe the car service rules is simply a Commission effort to put teeth in regulations which the railroads themselves recognized long ago as necessary to the efficient movement of rail traffic. Further the Commission cites numerous verified statements by shippers and railroads during the proceedings before the Commission which in varying manners expressed the need for better enforcement of the car service rules.[5]

Review of the evidence indicates that considerable testimony was presented on both sides of the question. Certainly all witnesses were not in agreement as to the advisability of instituting mandatory car service rules. If we had initial responsibility for decision of this case we might or might not weigh the evidence in the same manner or reach the conclusion reached by the Commission. Our review un-

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[5] Record references include: Boston and Main verified statement 7, page 30; Great Northern verified statement 19, pages 2-3; Missouri Pacific verified statement 11, page 3; Norfolk and Western verified statement 15, page 10; Northern Pacific verified statement 16, pages 6, 12, 13; Penn Central verified statement 17, page 11; National Industrial Traffic League verified statement 25, page 9; American Short Line Railroad Association verified statement 22, page 11; American Plywood Association verified statement 27, page 10.

der the Administrative Procedure Act, Title 5, U.S.C., Section 706, is limited to ascertaining whether there was substantial evidence in the record for the Commission decision. We find no difficulty in determining that the Commission action was based on substantial evidence.

That the mandatory car service rules do not by themselves correct all of the car shortage problems is irrelevant. The Commission recognized that the car shortage issue presented problems of gargantuan dimensions requiring attack across a wide front. The Commission stated at 335 I.C.C. 294:

> * * * They are not designed to improve the utilization of freight cars, except insofar as return loading is compatible with the primary objective of increasing availability of cars to the owner. Thus, improved utilization will be largely in control of the owner who can then provide for the needs of his shippers for whom the equipment was acquired. The greater availability of owned cars rather than haphazard reliance on the supply of foreign cars will provide the owner with an opportunity to measure more accurately its ownership requirements. It will also permit the owner to maintain the car in a condition suitable for use when it is returned. Enforcement of the rules will shift the responsibility for shortages to the railroad with inadequate ownership and compel such a railroad to increase its fleet and to provide better maintenance for its cars. If a railroad has assurances that it can secure frequent and repeated loadings of its own cars, and if it is prohibited from indiscriminate use of misloading on someone else's cars, it will tend to correct any ownership deficiencies it may have. Moreover, once it is in

a position to know that ownership levels it must maintain, it will also be able to justify the investment required.

We take due note of the decision of the statutory 3-judge district court in *Allegheny Ludlum Steel Corporation* v. *United States and Interstate Commerce Commission*, Civil Action 70-731, W.D. Pa. March 1971, which found that the imposition of mandatory car service rules did not meet the reasonableness requirements of Title 49, U.S.C. Section 1(14)(a). That court found that the Commission order was deficient primarily in that it failed to contain a finding of specific freight car shortage in the owner lines, and secondly because the Commission conceded that it would be unreasonable to expect total compliance with the mandatory car service rules.

With deference to the court deciding it, we think the holding in that case was wrong. We decline to follow it. In the first place we view the Commission explanation of the imposition of the rules, supra, as demonstrating that the *Allegheny Ludlum* court missed the point in faulting the Commission for failure to make a specific finding of a shortage in railroad cars on the owner lines. The Commission did make a finding, acknowledged in fact by the Pennsylvania court, that the freight car shortage was *all pervasive* throughout the United States. Considering this finding and the expertise which is committed to the Commission in governing interstate carriers, we think that the Commission acted lawfully in instituting an equitable policy which during a freight car shortage would operate to reward the owner lines by giving them maximum use of the cars in which they had invested. Put another way, the mandatory

car service rules are basically undergirded by the proposition that when a shortage of freight cars arises, the effect of the shortage should bear most heavily on the railroads which have failed to purchase an adequate car supply. The question is not, as the Pennsylvania court posed it, whether the shortage on the owner lines is more acute, but rather who should get first call on the use of cars during a shortage. Correctly stated then, we view the question as properly answered in the policy decision of the Commission to institute rules which would provide the greater usage to the owner lines.

The other major objection which the *Allegheny Ludlum* court raised to the mandatory car service rules was the Commission acknowledgment that a number of exceptions would be required daily to insure the proper flexibility in the use of rail cars. The Pennsylvania court reasoned that this admission that full compliance was impossible coupled with the possibility of criminal sanctions for non-compliance rendered the mandatory nature of the car service rules unreasonable. We disagree. The Commission likewise tells us that full compliance cannot be expected. We think that this is really nothing more than recognition that it is a rare rule which has no exceptions in practical application.

That the Commission recognizes that the most efficient use of rail cars in some specific situations might require exceptions to the rules does not mean that the Commission cannot *reasonably* proceed from a mandatory rule where, as here, proper machinery has been established for the allowance of those exceptions. To insure that the exceptions do not swallow the rules and to assure a national policy on the granting of exceptions, the Commission has established a national service to which the railroads will

submit requests for exceptions from the rules. The plaintiff and intervening roads claim that the Commission Bureau is far too under-staffed to handle all of the numerous daily requests for exceptions that will be produced in the fast-moving railroad business. We do not minimize the seriousness of this problem, but we think that it is a matter of administrative detail which can be left to the Commission to handle as procedures are developed for expeditious handling of requests for exceptions. These relatively minor "rough edges" on the Commission's plan should not be allowed to upset what we think is an otherwise reasonable agency plan to attack one phase of freight car shortages.

We therefore find the reasoning of the *Allegheny Ludlum* court unpersuasive. Our independent examination of the issue leads us to conclude that the mandatory car service rules constitute a reasonable exercise of Commission power, based upon substantial and sufficient evidence in the record before the Commission.

In consideration of the foregoing,

IT IS ORDERED:

1. This action is dismissed without prejudice as it pertains to relief from the car ownership formula.

2. The petitions for relief, enjoining, annulling and setting aside the mandatory car service rules are in all respects denied.

3. The temporary restraining orders entered by Judge McRae on June 24, 1970, and by Judge Simpson on May 12, 1971, enjoining enforcement of the Commission orders pending determination of this action are continued in effect for a period of 20 days following the date hereof, to permit an application to the Supreme Court of the United States or a Jus-

tice thereof for a temporary further stay in connection with appeal. Upon the expiration of said 20 days our temporary restraining orders are vacated and set aside.

4. This Memorandum Opinion and Judgment shall constitute the Final Judgment of this Court as to all issues presented in this action.

DONE and ORDERED this June 7, 1971.

/s/ Bryan Simpson
United States Circuit Judge

/s/ Charles R. Scott
United States District Judge

/s/ Gerald B. Tjoflat
United States District Judge

APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 70-731

ALLEGHENY-LUDLUM STEEL CORP., PLAINTIFFS

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, DEFENDANTS

NOTICE OF APPEAL

[Filed May 17, 1971]

I. Notice is hereby given that the United States of America, one of the defendants in the above-entitled action, hereby appeals to the Supreme Court of the United States from the opinion and order of this Court dated March 18, 1971. This appeal is taken pursuant to 28 U.S.C. § 1253.

II. The entire record in this action is hereby designated for certification by the Clerk of the District Court to the Clerk of the Supreme Court. The Clerk of the District Court is requested to prepare and to transmit the entire record to the Clerk of the Supreme Court.

This the 14th day of May, 1971.

/s/ John H. D. Wigger
JOHN H. D. WIGGER
Attorney
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Washington, D.C. 20530

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APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

Civil Action No. 70-731

ALLEGHENY-LUDLUM STEEL CORPORATION, ET AL.,
PLAINTIFFS

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, DEFENDANTS

NOTICE OF APPEAL
[Filed May 17, 1971]

I. Notice is hereby given that the Interstate Commerce Commission, one of the defendants in the above-entitled action, hereby appeals to the Supreme Court of the United States from the opinion and order of this Court dated March 18, 1971. This appeal is taken pursuant to 28 U.S.C. § 1253.

II. The entire record in this action is hereby designated for certification by the Clerk of the District Court to the Clerk of the Supreme Court. The Clerk of the District Court is requested to prepare and to transmit the entire record to the Clerk of the Supreme Court.

This the 14th day of May, 1971.

/s/ James F. Tao
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Attorney
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Washington, D. C. 20423

/s/ Fritz R. Kahn
FRITZ R. KAHN
General Counsel

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Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-227

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellants,*

v.

ALLEGHENY-LUDLUM STEEL CORPORATION, ET AL., *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MOTION TO AFFIRM OF ASSOCIATION OF AMERICAN RAILROADS

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October, 1971

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-227

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellants,*

v.

ALLEGHENY-LUDLUM STEEL CORPORATION, ET AL., *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MOTION TO AFFIRM OF ASSOCIATION OF AMERICAN RAILROADS

Appellee, the Association of American Railroads, (hereinafter sometimes referred to as "Association"), pursuant to Rule 16(1)(c) and (d) of the Rules of this Court, moves that the final judgment and decree of the three-judge District Court be affirmed on the ground that the questions

presented are so unsubstantial and the decision below so eminently correct as not to warrant briefing or oral argument of the case before this Court.

STATEMENT

This is an appeal from a final judgment and decree entered on March 18, 1971, by a three-judge District Court, 325 F. Supp. 352 (J.S.,[1] App. A. and B), setting aside and enjoining enforcement of certain portions of a report and order entered by the Interstate Commerce Commission in a proceeding entitled Ex Parte No. 241, *Investigation of Adequacy of Railroad Freight Car Ownership, Utilization, Distribution, Rules and Practices,* 335 I.C.C. 264, (J.S., App. C, D, and E).

An investigation was instituted by the Commission, on its own motion, on December 20, 1963, "for the purpose of ascertaining the adequacy of railroad freight car ownership." All Class I railroads and a selected group of Class II railroads and switching and terminal companies were made respondents. The investigation was conducted without benefit of oral hearing, and on June 18, 1964, Division 3 of the Commission entered an interim report (323 I.C.C. 48) in which it concluded that further study was necessary. By order of July 29, 1964, (App. A, *infra*), Division 3 of the Commission broadened the investigation "for the purpose of obtaining detailed and precise information on all phases of freight car ownership, utilization, distribution, rules and practices, which in any manner contribute to or affect the chronic freight car shortage problem, with the view (1) to consideration of the prescription of rules designed to alleviate the problem, and (2) to consideration of the issuance of an order or direction under the provisions of Section 1(13) of the Interstate Commerce Act." This order again named only Class I railroads and a

[1] J.S. as used herein refers to Government's jurisdictional statement.

selected group of Class II railroads and switching and terminal companies as respondents (App. A, *infra*, pp. 22-28).[2]

Numerous verified statements, reply statements, and exhibits were filed with the Commission. Evidentiary hearings were held before a Hearing Examiner, beginning on March 28, 1967, and ending on August 11, 1967, for a total of 50 days. The transcript of oral testimony exceeded 5,800 pages. In a recommended report evidencing meticulous and comprehensive review of the record, and observation of the witnesses, the Examiner concluded that:

> "Upon considering all of the evidence the hearing examiner finds that the record does not contain competent evidence upon which to base a conclusion as to the adequacy of freight car ownership; and that the adoption of the proposed car ownership formula, regulations, and car service rules has not been shown to be justified." (Examiner's Report, p. 63).

Approximately eighteen months later, Division 3, largely and sometimes entirely, ignoring the Examiner's recommended report and findings, entered a report (J.S. App. C, pp. 28-166) and order prescribing the car service rules here in issue for mandatory observance by the theretofore specifically named railroads (J.S., App. C, pp. 167-168).

Petitions for Reconsideration were filed by the Association, numerous individual railroads and shippers, and shipper organizations. By order of February 18, 1970 (J.S., App. D), the Commission denied the petitions, adopted

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[2] By its express terms the Commission's order here involved runs only against such named railroads. Many common carrier railroads originating and terminating freight traffic are not subject to the order. There is no validity, therefore, to the assertion in the Government's jurisdictional statement that the rules ordered by the Commission "govern the disposition of freight cars of all the nation's railroads" and "must be uniformly applied to all roads to avoid discrimination and inequities" (J.S., pp. 7-8). (For more detailed discussion see p. 16, *infra*.)

an exception provision as its Rule 19, and ordered the prescribed car service rules to become effective March 27, 1970. The effective date with respect to Rules 1 and 2 was postponed to July 1, 1970.

On June 23, 1970, fifteen steel companies and the American Iron and Steel Institute filed this action to enjoin and set aside the Commission's order to the extent it required mandatory observance of Car Service Rules 1 and 2. The Association, the National Industrial Traffic League, and the National Association of Shippers Advisory Boards intervened as parties plaintiff.

After reviewing the record as a whole, the District Court unanimously concluded that the Commission's rules and order did not meet the test of reasonableness, and pointed to three major deficiencies inherent in the Commission's report: "(1) a failure to find a specific freight car shortage in the owner-lines; (2) a failure to consider the financial effects upon the owner-lines and the shipping public; and (3) a concession that there cannot be more than 80 percent enforcement of regulations, the violation of which carries criminal penalties" (J.S., p. 25).[3] The Court then permanently enjoined the Interstate Commerce Commission "from enforcing or attempting to enforce that part of the orders of the Commission entered August 21, 1969, February 18, 1970, and March 18, 1970, which direct and require respondent railroads to comply effective July 1, 1970, with Rules 1 and 2" (J.S., p. 27).

ARGUMENT

The questions presented by this appeal are: (1) whether the Commission's order lacks the support of essential find-

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[3] This disposition of the case made it unnecessary for the District Court to decide other grounds upon which plaintiffs challenged the lawfulness and validity of the Commission's order, including the insufficiency of evidence to support such findings as the Commission did make.

ings, and (2) whether Car Service Rules 1 and 2 are reasonable rules when prescribed by the Commission for mandatory observance. The District Court held that the Commission's order did lack support of essential findings and that the rules were not reasonable when made mandatory by Commission order. Resolution of these questions by the District Court did not involve a ruling on constitutional or jurisdictional issues, or the application of any new, uncertain, or disputed principles of law. Its action is so eminently correct as to require affirmance by this Court.

I. The Questions Presented Are Not Substantial

This appeal presents no substantial questions or important issues of federal transportation law warranting plenary review by this Court. The Government states that "this case presents important issues of federal transportation law having pervasive effect upon all rail carriers, as well as shippers and consumers, in the nation." What are those issues? The jurisdictional statement certainly does not reveal any important issues of federal transportation law requiring plenary consideration by this Court. There are no constitutional or jurisdictional issues involved in this appeal. No one has questioned the Commission's power under the Interstate Commerce Act to deal with car shortages or to prescribe reasonable car service rules. There are no issues presented that require this Court to interpret or construe federal transportation statutes. The appeal simply is one presenting the normal questions involved in court review of regulatory agency action.

Review of the District Court's opinion is sought on the grounds that: (1) there exists a conflict of decisions by two district courts; and (2) the findings of the District Court are "not well founded" and are erroneous (J.S., pp. 7-9). The Government asserts that there is a conflict between the District Court's opinion below and that of a district court in *Florida East Coast Ry.* v. *United States*, 327 F. Supp. 1076 (J.S., App. F). Examination of the

two decisions reveals that there exists no conflict of the nature involved in the two authorities relied upon by the Government (J.S., p. 8). *United States* v. *O'Malley*, 383 U.S. 627, involved two conflicting interpretations of a provision of the Internal Revenue Code. *Bingler* v. *Johnson*, 394 U.S. 741, involved two conflicting decisions as to the validity of an Internal Revenue Service regulation, the resolution of which conflict required this Court to examine the legislative history of a provision of the Internal Revenue Code and to construe that statute.

The Florida court's disagreement with the opinion of the District Court below was simply by way of dicta. The limited review given by the Florida court and the basis for its decision, as stated in its opinion, was that:

> "Our review under the Administrative Procedure Act, Title 5, U.S.C., Section 706, is limited to ascertaining whether there was substantial evidence in the record for the Commission decision. We find no difficulty in determining that the Commission action was based on substantial evidence." (J.S., pp. 198-199.)

Having thus disposed of the case upon the sole ground of substantial evidence to support the Commission's action, the Florida court then criticized the entirely different matters upon which the District Court below rested its decision in this case—matters which made it unnecessary for that Court to deal with the question upon which the Florida court based its decision.

What the Government is really asking this Court to do is to reject the District Court's opinion below and to substitute therefor the dicta of the Florida court. But, as this Court pointed out in *United States* v. *Champlin Refining Co.*, 341 U.S. 290, 301 (1951), "it is not the function of this Court to rescue the Commission by making findings *de novo* which the Commission itself was unable or unwilling to make." Under the circumstances here, this Court should adhere to its usual "rule of non-interference"

unless it believes the District Court below has not made a "fair assessment" of the report and the record as a whole, or has "misapprehended or grossly misapplied" the applicable principles of law or standard of review. *F.T.C.* v. *Standard Oil Co.*, 355 U.S. 396, 400-401 (1957); *Universal Camera Corp.* v. *Labor Board*, 340 U.S. 474, 491 (1951).

It is important to note that the decree below did not, nor will its affirmance by this Court, strip the Commission of authority to deal with car shortages. It is not barred from conducting further proceedings, receiving additional evidence, and correcting the deficiencies pointed out by the Court. In fact, the Commission has held the investigation and record open for possible further proceedings (J.S., p. 88).

The District Court's injunction has not rendered the Commission impotent. Indeed, Commission counsel argued, the Florida court agreed (J.S., pp. 191-192), and the Jurisdictional Statement says (pp. 4-5), that the order here involved is simply one in an arsenal of weapons being used by the Commission to attack the same problem. Nor is the Commission denied the use of this weapon if wielded upon a proper record.

The arsenal of weapons argument was made by Commission counsel to the District Court below. He besought the District Court below:

> "And I beseech you to view the reasonableness of what the Commission was doing here, ex parte number 241, in the light of what it did in the basic per diem case, the incentive per diem case, and in the exercise of its authority under Section 1(15) of the Act and the emergency provisions."[4]

But the Court below properly considered the Commission's action on the record in this proceeding and this proceeding

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[4] Excerpt from fourth page of transcript of oral argument by Commission counsel before the Court below.

alone. The order involved in this case is the order entered by the Commission in Ex Parte No. 241 and not "a series of orders" entered in other proceedings as intimated by the Government (J.S., p. 4). A motion to have the proceedings in Ex Parte No. 241 and Ex Parte No. 252, *Incentive Per Diem Charges,* 332 I.C.C. 11, one of the "series" referred to by the Government (J.S., p. 5), consolidated for hearing and disposition on the same record was denied by the Commission's order of August 23, 1966 (App. B, *infra*).[5] Such denial is entirely inconsistent with the argument made below, and now being made by the Government to this Court, that matters in other proceedings pertaining to incentive per diem charges are to be relied upon to sustain the Commission's action in Ex Parte No. 241.

II. The District Court's Opinion Is Clearly Correct And Should Be Affirmed

This Court and lower courts have long recognized that rules or regulations promulgated by an administrative agency must be reasonable and fair. *Universal Camera Corp., supra,* p. 490. A reasonable rule or regulation must serve a useful purpose, bear a real and substantial relation to the objective sought to be obtained, not be harmful or wasteful, and be susceptible of being complied with. *Atlantic Coast Line R. Co.* v. *United States,* 112 F.Supp. 594, 597 (1953); *Palmer* v. *United States,* 75 F.Supp. 63, 68 (1947); and *Iversen* v. *United States,* 63 F.Supp. 1001, 1006 (1946), *aff'd per curiam,* 327 U.S. 767 (1946). The District Court below recognized that the Commission's order prescribing mandatory Car Service Rules 1 and 2 did not meet any of these criteria.

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[5] Such order recites that it is without prejudice to renewal before that hearing examiner of the portion of the motion objecting to the taking of official notice in Ex Parte No. 252 of the record in Ex Parte No. 241. It is not without significance that, upon renewal of the objection in that proceeding, the examiner ruled that official notice would be taken only of matters identified and submitted at the hearing.

The Commission must make findings that support its decision and those findings must be supported by substantial evidence. See *Burlington Truck Lines,* 371 U.S. 156, 168 (1962), and the cases cited therein. If basic or essential findings are lacking from the Commission's report, the decision must be set aside and the court is not required to resolve opposing contentions as to what the evidence shows. *Soo Line R.R.* v. *United States,* 280 Fed. Supp. 907, 917-918 (D. Minn. 1968); *Florida* v. *United States,* 282 U.S. 194, 215 (1931). The reviewing court is not called upon to ascertain whether, upon the record, the Commission could have made other and adequate findings, since the Commission's order must be upheld, if at all, on the basis articulated by the agency. *Burlington Truck Lines, supra,* p. 169; *American Trucking Ass'ns.* v. *United States,* 364 U.S. 1, 13-14 (1960). Furthermore, the Commission is not relieved of the requirement for basic and adequate findings because of its presumed expertise. *Burlington Truck Lines, supra,* p. 167.

It bears repeating that the District Court below was concerned largely with the absence of essential findings while the Florida court was concerned almost solely with a resolution of opposing contentions as to what the evidence showed. (J.S., p. 198) There is no conflict in the decisions which warrants plenary review of this case.

The Government argues that the District Court below erred in holding that a specific finding of car shortage on the owner-lines was required (J.S., p. 9). In a footnote the Government states that the issue was never raised before the Commission, and thus was not properly before the District Court. The question of an individual railroad's ownership of and need for freight cars was raised early in the proceeding by the Commission itself. In the Interim Report (323 I.C.C. 48), Division 3 of the Commission, at page 48, referred to efforts to obtain specific information from individual carriers and its inability at that time to

determine the adequacy of any individual carrier's fleet. In brief before the Commission the Association argued, and the Examiner agreed, that there was a lack of evidence pertaining to the freight car needs of individual carriers. (Brief before the Commission, p. 6; Examiner's Report, p. 17)

Again, in its Petition for Reconsideration, filed with the Commission on November 3, 1969, the Association raised the following questions and issues:

> "It is not enough for the Division to only say 'we are convinced that there is a continuing freight car shortage' as if it were a matter of common knowledge. How many freight cars are needed? What type of freight car? By which railroad? These and many other related questions remain unanswered and cannot possibly be answered by the evidence of record in this proceeding. (p. 13).
>
> * * *
>
> Mandatory observance of Rules 1 and 2 assumes that freight cars are always needed on the owner's line. This is not true most of the time on predominantly terminating railroads and some of the time on predominantly originating railroads. When cars are not required on the owner's line, there is no necessity that they be handled in accordance with car service rules, if there is a need for them by the non-owners." (p. 84)

The issue of shortages on owner railroads was raised before the Commission on several occasions, but there was never any discussion or finding made by the Commission pertaining to that issue. The District Court below was properly concerned about the Commission's failure to find a specific freight car shortage on the owner lines (J.S., p. 20), especially since the court in *Palmer* v. *United States, supra,* p. 75, considered the absence of an identical finding to be fatal.

The stated purpose of the Commission proceeding was to consider "the prescription of rules designed to alleviate the problem" (J.S., p. 29 and App. A, *infra,* p. 19). The

so-called "problem" is stated to be a "chronic freight car shortage" (App. A, *infra*, p. 18). A freight car shortage is defined by Commission counsel as "an inability to have a needed car in a particular place at a particular time" (Commission's Brief before the District Court, p. 1). The Commission's order prescribing mandatory car service rules has "the primary objective of increasing availability of cars to the owner" (J.S., p. 65) and whether such owner needs them or not (Examiner's Report, p. 23), rather than getting "a needed car to a particular place at a particular time." Only by mere coincidence could the order relieve any such shortage. The District Court noted the absence of railroad or shipper support for the Commission's prescription of mandatory Car Service Rules 1 and 2, even though such was purportedly done for their benefit (J.S., p. 22).

The Government attempts to justify the Commission's action as a "policy determination" that during a period of general shortages all cars must be returned to their owners (J.S., p. 9). Such a policy is inconsistent with previous Commission policy and contrary to the National Transportation Policy (49 U.S.C., preceding § 1), (App. C. *infra*).

When the supply of freight cars is high relative to demand, the movement patterns of freight cars follow that contemplated by the Car Service Rules, with an outbound movement off-line followed by a return movement, empty or loaded, to or toward the owner. But, where there is a freight car shortage, the movement patterns normally do not follow those contemplated under the Car Service Rules. Instead, cars made empty on one railroad are immediately reloaded, regardless of their ownership, and empty mileage and empty car days are reduced to a minimum. As the Commission noted in an earlier proceeding, when this practice is followed in the case of a car shortage it permits the handling of maximum tonnage and in such times mandatory or rigid observance of car service rules must

be shelved as being inconsistent with the maximum utilization of cars. *Car Service, Freight Cars,* 268 I.C.C. 687, 690-691 (1947). The Commission recognized in that proceeding that mandatory observance of Car Service Rules in times of shortage would cause an increase in the empty mileage and empty car days experienced by the carriers, with the result that the aggregate carrying capacity of the fleet could be materially reduced.

It is evident from the foregoing that in Ex Parte 241 the Commission has changed its policy because now it assumes that in times of shortages, cars will be forced back to their owners; low ownership lines will be deprived of the use of cars belonging to others; this will create shortages on the low ownership lines and deprive their shippers of transportation; and the low ownership lines will thereby be compelled to increase their fleets, or else stand embarrassed before their shippers (J.S., pp. 65-66). It appears that the policy of sharing freight cars during shortages is now to be scrapped in favor of the Commission's new policy under which shippers on some railroads would be protected and shippers on other railroads would be made to suffer. Efficient service would be replaced by inefficient service as wasted empty car days and mileage mount. These are not the characteristics of the "adequate, economical, and efficient service" of a "national transportation system" specified by Congress in the National Transportation Policy (App. C, *infra*). Articulation by the Commission is required to explain how such a departure comports with that policy. This Court has held that if the findings do not provide the courts with a basis for determining whether the agency decision comports with the National Transportation Policy, the decision must be set aside. *Schaffer Transp. Co.* v. *United States,* 355 U.S. 83, 91 (1957).

The concern of the District Court below over the failure of the Commission to give adequate consideration to the financial effects upon the railroads and the shipping public

was well founded. It pointed to the absence of any consideration by the Commission of the financial ability of railroads to buy cars which the Commission said they would be forced to buy. It called attention to the fact that the Commission's main witness considered economic impact to be irrelevant to the proceedings (J.S., pp. 20-21). It may be noted in passing that this omission by the Commission and the ruling of the Court below on this point was not considered or even mentioned by the Florida court.

Furthermore, in Ex Parte No. 252, *Incentive Per Diem Charges, supra,* as the Examiner noted in his report, the Commission set forth certain factors it deemed necessary to consider under section 1(14)(a) of the Interstate Commerce Act for any determination as to the adequacy of the freight car fleet (Examiner's Report, p. 17). Not a single one of those factors is mentioned or discussed in the Commission's report and the absence thereof is not explained. There are no findings or discussion whatsoever to explain why the Commission has suddenly departed from such standards.[6]

An administrative agency is not prohibited from modifying or changing its regulatory policy. However, both common sense and precedent dictate that especially rigorous standards of clarity and rationality should be required by the courts where the agency has dealt with the issues at hand in a fashion inconsistent with previous cases. The Commission "has not adequately explained its departure from prior norms." *Secretary of Agriculture* v. *United States,* 347 U.S. 645 (1954). The concern of the District Court below over the Commission's failure is similar to the surprise expressed by the Court of Appeals in *Marine Space Enclosures, Inc.* v. *F. M. C.,* 420 F. 2d. 577, 585 (1969),

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[6] The Court below was disturbed and concerned over the lack of articulation and explanation in the Commission's report. (J.S., p. 18, 20-21)

over that Commission's departure in an opinion which "offers the sparsest of findings and speaks in the most conclusory terms".

The District Court below approached this case with full awareness of and responsiveness to the court's role in the review of an administrative agency decision. Reviewing courts are not obliged to stand aside and rubber stamp administrative decisions. *N.L.R.B.* v. *Brown,* 380 U.S. 278, 291-(1965). If the findings are inadequate or improper the court is powerless to affirm the administrative action. The court is not expected "to chisel that which must be precise from what the agency has left vague and indecisive." *S.E.C.* v. *Chenery Corp.,* 332 U.S. 194, 196-197 (1947).

The District Court below also was concerned about, but did not rule upon, the constitutional question raised by mandatory rules which have the effect of law and when there cannot be more than eighty percent compliance (J.S., p. 25). The Government does not deny the inability to fully comply with the mandatory rules, nor does it deny that criminal penalties would be applicable for violations of the rules. It merely states that criminal penalties do not automatically attach to every instance of non-compliance, since criminal intent has to be proven (J.S., p. 11). Notwithstanding this, civil forfeitures are also applicable and could be sought in every instance of non-compliance, whether willful or not. In the case cited by the Government, *United States* v. *Southern Ry. Co.,* 250 F. Supp. 759, 770 (D.S.C. 1966), reversed on other grounds, 380 F. 2d. 49, the court, referring to the emergency car service order there involved, pointed out that seeking penalties "where compliance has not been reasonably possible will not advance the Order's aim" and that adding "an unconscionable monetary penalty to the misfortune that prevented the carrier's compliance with the strict mandate . . . cannot promote speed of car handling".

Another salient aspect of the review of the record by the

District Court below (and absent from the Florida court's review) was its consideration and discussion of the Examiner's recommended report (J.S., pp. 18-19). The Commission's report merely recognized the existence of the Examiner's report by stating little more than that, "our conclusions differ in part from those recommended" (J.S., pp. 28-29). The Examiner's report was a detailed review of the evidence and issues in the proceeding, and the fact that the Commission disagreed with it does not decry the significance or value of that report. *Retail Store Employees* v. *N.L.R.B.*, 360 F. 2d 494, 496 (1965). Under the Administrative Procedure Act, the Examiner's recommended report, whether or not adopted by the agency, becomes a part of the record (5 U.S.C. § 557(c)), and on review the courts must look at the "whole record" (5 U.S.C. § 706), including the Examiner's report. *Stanislaus County* v. *United States*, 236 F. Supp. 146, 148 (N.D. Cal. 1964); *Universal Camera Corp., supra*, p. 493.

The Florida court's opinion gives rise to grave doubt that its review comports with this Court's decision in *Universal Camera Corp., supra.* Its failure to deal with the Examiner's report clearly indicates that its determination was not predicated upon review of the "record as a whole." Referring to the Examiner's findings as simply things he was "asserting", it disposed of his report in a single sentence (J.S., p. 186). Apparently that court considered the Commission's disagreement as disposing of the Examiner's report. The fact is that such is not the case and, in view of the diametrically opposite findings of the Commission, the Examiner's report assumes greater significance and should have been dealt with by the Florida court. In *Universal Camera Corp., supra*, p. 497, this Court reversed the Court of Appeals for accepting that Board's rejection of an examiner's report and remanded with direction to accord the examiner's report the relevance it reasonably commanded in answering the comprehensive question

whether, upon the entire record, the evidence supporting the Board's order was substantial. In the case at bar, the Examiner even commented on the inability of the Commission's witnesses to stand cross-examination in connection with their proposal of mandatory car service rules (Examiner's Report p. 23).

While the Florida court accepted the representations of counsel as evidence of record, the specifics cited by Commission counsel do not correspond to the matters described by the Commission in its report, they were not made known at the hearing before the Commission. Counsel's "post-hoc rationalizations" may not be used to explain what the Commission had in mind. *Burlington Truck Lines* v. *United States, supra,* p. 168 (1962); *Securities & Exchange Comm'n* v. *Chenery Corp., supra,* p. 196. This Court many years ago held that "[f]acts conceivably known to the Commission but not put in evidence will not support an order." *Chicago Junction Case,* 264 U.S. 258, 263 (1924); *Interstate Commerce Commission* v. *Louisville & Nashville R.R. Co.,* 227 U.S. 88, 93 (1913). Nor, having rested its decision on matters *de hors* the record, is there any saving grace in later identifying such matters.

The Government incorrectly states that "[t]he rules at issue govern the disposition of freight cars of *all* the nation's railroads" (J.S., p. 7) (emphasis added). It argues that "[s]uch rules must be uniformly applied to all railroads to avoid discrimination and inequities." The Commission stated in its report that it would require the rules to be observed by "all carriers at all times" (J.S., p. 62). The truth of the matter is that the Commission's order prescribing mandatory Car Service Rules 1 and 2 will apply only to those railroads named as respondents in such order (App. A., *infra,* pp. 22-28 and J.S., p. 167). This type of error in a Commission report and accompanying order is similar to that found by this Court to be fatal in *Chicago, R. I. & P. Ry. Co.* v. *United States,* 284 U.S. 80, 96 (1931).

The respondent railroads subject to the Commission's prescription of mandatory Car Service Rules 1 and 2 would be placed at a highly competitive disadvantage, operation-wise and cost-wise, with the many railroads not subject to the order and with other modes of transportation, particularly motor carriers. Under such circumstances, the Commission's order does not provide for "fair and impartial regulation" as required by the National Transportation Policy. (App. C, *infra*).

CONCLUSION

For the foregoing reasons, the judgment of the District Court below should be affirmed.

Respectfully submitted,

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October, 1971

APPENDIX A

SERVICE DATE
AUGUST 11, 1964

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, held at its office in Washington, D. C., on the 29th day of July, A. D. 1964.

Ex Parte No. 241

INVESTIGATION OF ADEQUACY OF RAILROAD FREIGHT CAR OWNERSHIP, CAR UTILIZATION, DISTRIBUTION, RULES AND PRACTICES

NOTICE OF PROPOSED RULE MAKING
(49 CFR 95-97)

Upon consideration of the record in this proceeding, including the conclusions reached in the report decided June 18, 1964, 323 I.C.C. 48:

It is ordered, That under authority of Part I of the Interstate Commerce Act (49 U.S.C. 1, et seq.), more particularly Sections 1(13) and (14)(a) and 13(2) thereof, and Section 4 of the Administrative Procedure Act (5 U.S.C. 1003), this proceeding be, and it is hereby, broadened for the purpose of obtaining detailed and precise information on all phases of freight car ownership, utilization, distribution, rules and practices which in any manner contribute to or affect the chronic freight car shortage problem, with the

view (1) to consideration of the prescription of rules designed to alleviate the problem and (2) to consideration of the issuance of an order or direction under the provisions of Section 1(13) of the Interstate Commerce Act.

It is further ordered, That all railroads listed in Appendix A hereto be, and they are hereby, made respondents in this proceeding; and that all other railroads (some Class II and switching and terminal companies) made respondents by the order of December 20, 1963, be, and they are hereby, relieved of any further obligation to participate as respondents in this proceeding.

It is further ordered, That the Bureau of Inquiry and Compliance of this Commission be, and it is hereby, authorized to participate in this proceeding.

It is further ordered, That the procedure to be followed shall be:

1. Prior to January 1, 1965, the respondents listed in Appendix A attached hereto shall supply the information outlined in Sections I through XIII of the instructions attached hereto as Appendix B, by completing and filing with the Commission at its office in Washington, D.C., seven copies of the forms attached hereto as Appendices C and D.

2. Prior to June 1, 1965, all respondents listed in Appendix A hereto shall supply the information outlined in Sections XIV through XVI of the said instructions attached as Appendix B by completing, filing and serving as specified in 1 above the forms attached hereto as Appendices E and F.

3. Prior to January 1, 1965, any person desiring to participate in this proceeding must notify the Secretary of this Commission by letter to that effect, giving his name, address, and company or group represented. After that date no additional interventions will be allowed except by

special permission and for good cause shown. To conserve time and avoid expense it is strongly urged that persons having common interests, endeavor to consolidate their presentation to the greatest extent possible. Individual participation is not precluded; mere casual interest, however, does not justify participation, and will make the service of verified statements burdensome and impracticable. The Commission desires participation only by those who intend to take an active part in the proceeding.

4. As soon as practicable after January 1, 1965, the Commission will serve a list of the names and addresses of all persons upon whom service of all verified statements, replies or other pleadings hereinafter specified must, unless waived, be made. An original (signed in ink) and 20 copies of each verified statement, reply or pleading shall be filed with the Commission and a copy of each such statement, reply or other pleading shall be served on each person named in the list prepared and served pursuant to this paragraph in accordance with Rule 1.22 of the Commission's General Rules of Practice.

5. Prior to July 1, 1965, any party to the proceeding may file and serve a verified [1] statement of relevant facts and any argument he desires to make. Where both facts and argument are included in the same document, they shall be set forth under separate headings. Such document should, where appropriate, contain a discussion of any proposed rules including a detailed justification therefor, a discussion of the proper formula or formulas to be used in determining the adequacy of freight car ownership by type by individual carrier, and a discussion by respondents of the subjects listed in Appendix G.

[1] In lieu of verification under oath, the statements and replies may be made subject to the following declaration: "I solemnly declare that I have examined the foregoing statement (or reply) and that to the best of my knowledge and belief the representations of fact contained therein are true." (Signature)

6. Prior to August 1, 1965, any party may file replies to the initial statements.

7. Prior to September 1, 1965, any party may file and serve a request for oral hearing, together with justification therefor. Any reply thereto must be filed prior to September 15, 1965.

8. Postponement of the above specified time schedule is not contemplated and will not be granted except upon detailed justification.

9. Only such documents and pleadings as are specifically permitted under these rules may be filed.

And it is further ordered, That a copy of this order and 10 additional copies of Appendices C, D, E and F shall be served upon each respondent; that a copy of this order be served on the public utility commissions or boards or similar regulatory bodies of each State; that a copy be posted in the office of the Secretary of this Commission; that a copy be served on the Association of American Railroads, Car Service Division, and upon The American Short Line Railroad Association, and that a copy be delivered to the Director, Division of Federal Register, for publication in the Federal Register.

By the Commission, Division 3.

HAROLD D. MCCOY

Secretary

(SEAL)

Appendix A—Ex Parte No. 241

Class I Railroads

Akron, Canton & Youngstown RR.
Ann Arbor RR.
Atchison, Topeka & Santa Fe Ry.
Atlanta & St. Andrews Bay Ry.
Atlanta & West Point RR.—Western Ry. of Alabama
Atlantic Coast Line RR.
Baltimore & Ohio RR.
Bangor & Aroostook RR.
Bessemer & Lake Erie RR.
Boston & Maine RR.
Central of Georgia Ry.
Central RR. Co. of New Jersey
Central Vermont Ry., Inc.
Chesapeake & Ohio Ry.
Chicago & Eastern Illinois RR.
Chicago & Illinois Midland Ry.
Chicago & North Western Ry. System
Chicago, Burlington & Quincy RR.
Chicago Great Western Ry.
Chicago, Milwaukee, St. Paul & Pacific RR.
Chicago, Rock Island & Pacific RR.
Clinchfield RR.
Colorado & Southern Ry. System
Colorado & Wyoming Ry.
Delaware & Hudson RR.
Denver & Rio Grande Western RR.
Detroit & Toledo Shore Line RR.
Detroit, Toledo & Ironton RR.
Duluth, Missabe & Iron Range Ry.
Duluth, Winnipeg & Pacific Ry.
Elgin, Joliet & Eastern Ry.
Erie-Lackawanna RR.
Florida East Coast Ry.
Georgia RR.

Georgia & Florida RR.
Grand Trunk Western RR.
Great Northern Ry.
Green Bay & Western RR. (Inc. KGB&W)
Gulf, Mobile & Ohio RR.
Illinois Central RR.
Illinois Terminal RR.
Kansas City Southern Ry. (Inc. L&A)
Kansas, Oklahoma & Gulf Ry. (MV & OC-A-A)
Lake Superior & Ishpeming RR.
Lehigh & Hudson River Ry.
Lehigh Valley RR.
Long Island RR.
Louisville & Nashville RR.
Maine Central RR.
Minneapolis, Northfield & Southern Ry.
Missouri-Illinois RR.
Missouri-Kansas-Texas RR.
Missouri Pacific RR.
Monon RR.
Monongahela Ry.
New York Central RR. System
New York, Chicago & St. Louis RR.
New York Connecting RR.
New York, New Haven & Hartford RR.
New York, Susquehanna & Western RR.
Norfolk & Western Ry.
Norfolk Southern Ry.
Northern Pacific Ry.
Pennsylvania RR.
Pennsylvania-Reading Seashore Lines
Piedmont & Northern Ry.
Pittsburgh & Lake Erie RR.
Pittsburgh & West Virginia Ry.
Reading
Richmond, Fredericksburg & Potomac R.R.
St. Louis-San Francisco Ry. (Inc. QA&P)

St. Louis Southwestern Ry.
Savannah & Atlanta Ry.
Seaboard Air Line RR.
Soo Line RR.
Southern Pacific System
Southern Ry. System
Spokane International RR.
Spokane, Portland & Seattle Ry.
Staten Island Rapid Transit Ry.
Tennessee Central Ry.
Texas & Pacific Ry.
Texas Mexican Ry.
Toledo, Peoria & Western RR.
Union Pacific RR.
Wabash RR.
Western Maryland Ry.
Western Pacific R.R.

Appendix A—Ex Parte No. 241

Class II Railroads

Aberdeen & Rockfish RR.
Algers, Winslow & Western Ry.
Angelina & Neches River RR.
Apache Ry.
Apalachicola Northern RR.
Arkansas & Louisiana Missouri Ry.
Ashley, Drew & Northern Ry.
Atlantic & East Carolina Ry.
Bauxite & Northern Ry.
California Western RR.
Camas Prairie RR.
Cambria & Indiana RR.
Cedar Rapids & Iowa City Ry.
Central California Traction Co.
Columbia & Cowlitz Ry.
Columbia, Newberry & Laurens RR.

Columbus & Greenville Ry.
Corinth & Counce RR.
Des Moines & Central Iowa Ry.
Detroit & Mackinac Ry.
Duluth & Northeastern RR.
Durham & Southern Ry.
Escanaba & Lake Superior RR.
Ft. Dodge, Des Moines & Southern Ry.
Gainesville Midland RR.
Genessee & Wyoming RR.
Georgia Northern Ry.
Great Western Ry.
Interstate RR.
Kewaunee, Green Bay & Western RR.
Lake Erie, Franklin & Clarion RR.
Lancaster & Chester Ry.
Live Oak, Perry & Gulf RR.
Longview, Portland & Northern RR.
Louisiana & North West RR.
Louisiana Midland Ry.
Marinette, Tomahawk & Western RR.
McCloud River RR.
Meridian & Bigbee RR.
Minnesota, Dakota & Western Ry.
Mississippi Central RR.
Mississippi Export RR.
Montour RR.
Nevada Northern Ry.
New Orleans & Lower Coast RR.
Norfolk, Franklin and Danville Ry.
North Louisiana & Gulf RR.
Northeast Oklahoma RR.
Oregon & Northwestern RR.
Oregon, Pacific & Eastern Ry.
Pittsburg & Shawmut RR.
Pittsburgh, Chartiers & Youghiogheny Ry.
Point Comfort & Northern Ry.

Port Huron & Detroit RR.
Portland Traction Co.
Raritan River RR.
Roscoe, Snyder & Pacific Ry.
Sacramento Northern Ry.
St. Johnsbury & Lamoille County RR.
St. Marys RR.
Sandersville RR.
Sands Spring Ry.
Santa Maria Valley RR.
Tennessee, Alabama & Georgia Ry.
Tennessee RR.
Texas & New Mexico Ry.
Texas & Northern Ry.
Tidewater Southern Ry.
Trona Ry.
Utah Ry.
Valdosta Southern RR.
Washington & Old Dominion RR.
Waterloo RR.
West Virginia Northern RR.
Winston-Salem Southbound Ry.

Appendix A—Ex Parte No. 241

Switching and Terminal Companies.

Akron & Barberton Belt RR.
Aliquippa & Southern RR.
Alton & Southern RR.
Baltimore & Ohio Chicago Terminal RR.
Belt Ry. of Chicago
Birmingham Southern RR.
Brooklyn Eastern District Terminal
Buffalo Creek RR.
Bush Terminal RR.
Canton RR.
Chicago & Illinois Western RR.

Chicago Heights Terminal Transfer Co.
Chicago River & Indiana RR.
Chicago, West Pullman & Southern RR.
Conemaugh & Black Lick RR.
Cuyahoga Valley Ry.
Delray Connecting RR.
Detroit Terminal RR.
Fairport, Painesville & Eastern RR.
Houston Belt & Terminal Ry.
Illinois Northern Ry.
Indiana Harbor Belt RR.
Kansas City Terminal Ry.
Kentucky & Indiana Terminal RR.
Lake Erie & Eastern RR.
Lake Terminal RR.
Lakefront Dock & RR. Terminal
Los Angeles Junction Ry.
Manufacturers Connecting RR.
McKeesport Connecting RR.
Modesto & Empire Traction Co.
Monongahela Connecting RR.
Newburgh & South Shore Ry.
New Orleans Public Belt RR.
New Orleans Terminal Co.
New York Dock RR.
Norfolk & Portsmouth Belt Line RR.
Patapsco & Back Rivers RR.
Peoria & Pekin Union Ry.
Philadelphia, Bethlehem & New England
Pittsburgh & Ohio Valley Ry.
Railroad of New Orleans
River Terminal Ry.
St. Johns River Terminal Co.
South Buffalo Ry.
South Omaha Terminal Ry.
Steelton & Highspire RR.
Terminal Railroad Association of St. Louis

Terminal Ry. Alabama State Docks
Texas City Terminal Ry.
Texas Pacific-Missouri Pacific Terminal
Toledo Terminal RR.
Union RR (Pennsylvania)
Union Ry. (Memphis, Tenn.)
Union Terminal Ry. (St. Joseph, Mo.)
Upper Merion & Plymouth RR.
Wyandotte Terminal RR.
Youngstown & Northern RR.

(Other appendices to order not reproduced)

APPENDIX B

ORDER

Interstate Commerce Commission

EX PARTE NO. 241

INVESTIGATION OF ADEQUACY OF RAILROAD FREIGHT CAR OWNERSHIP, CAR UTILIZATION, DISTRIBUTION, RULES AND PRACTICES

EX PARTE NO. 252

INCENTIVE PER DIEM CHARGES

IN THE MATTER OF THE MOTION FILED AUGUST 5, 1966 BY SOUTHERN RAILWAY COMPANY AND AFFILIATED LINES

PRESENT: John W. Bush, Chairman, and Rupert L. Murphy, Commissioner, to whom the matters which are the subject of this order have been assigned for action thereon.

Upon consideration of the motion filed on August 5, 1966, on behalf of Southern Railway Company and affiliated lines for consolidation of the two above-entitled proceedings and for other relief, and the letter requests of The Long Island Rail Road and The Boston and Maine Corporation, et al, for extension of time to reply to the motion:

It is ordered, That the motion be, and it is hereby, denied for the reason that it does not present sufficient grounds to warrant granting the action sought; without prejudice, however, to the renewal before the Hearing Examiner of that portion concerning objection to the taking of official notice in Ex Parte No. 252 of the record in Ex Parte No. 241.

Dated at Washington, D.C., this 23rd day of August, A.D. 1966.

By the Commission, Chairman Bush and Commissioner Murphy.

H. NEIL GARSON
Secretary

(SEAL)

APPENDIX C

NATIONAL TRANSPORTATION POLICY

[*September 18, 1940.*] [*49 U. S. C., preceding §§ 1, 301, 901, and 1001*]. It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discrimination, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

SUPREME COURT, U. S.

FILED

OCT 15 1971

E. ROBERT SEAVER, CLERK

No. 71-227

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,
Appellants,

v.

ALLEGHENY-LUDLUM STEEL CORPORATION, ET AL.,
Appellees.

On Appeal from the United States District Court for the Western District of Pennsylvania

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MOTION TO AFFIRM OF ALLEGHENY-LUDLUM STEEL CORPORATION, ET AL.

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Counsel for Allegheny-Ludlum Steel Corporation, et al.

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-227

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,
Appellants,

v.

ALLEGHENY-LUDLUM STEEL CORPORATION, ET AL.,
Appellees.

On Appeal from the United States District Court for the Western District of Pennsylvania

---

MOTION TO AFFIRM

Pursuant to Rule 16 of the Rules of this Court, appellees American Iron and Steel Institute ("Institute") and 15 steel producers[1] hereby move that the judgment of the district court be affirmed.

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[1] Appellees steel producers are Allegheny-Ludlum Steel Corporation, Division of Allegheny-Ludlum Industries, Inc.; Armco Steel Corporation; Bethlehem Steel Corporation; Granite City Steel Company; Inland Steel Company; Jones and Laughlin Steel Corporation; Kaiser Steel Corporation; Laclede Steel Company; Lukens Steel Company; National Steel Corporation; Republic Steel Corporation; Sharon Steel Corporation; United States Steel Corporation; Wheeling-Pittsburgh Steel Corporation; and Youngstown Sheet and Tube Company.

STATEMENT

This is an appeal from the judgment of a three-judge district court which enjoined the enforcement of the part of an order ("Order") entered by the Interstate Commerce Commission ("Commission") which prescribed car service rules 1 and 2, adopted by the railroad members of the American Association of Railroads ("AAR") as guidelines for the loading and disposition of foreign cars,[2] for mandatory observance by all railroads designated by the Commission as parties to its proceeding.[3] The mandatory imposition of these rules, which, in essence, require that foreign cars be loaded or sent empty to or toward the lines of the owners of such cars, was the only part of the Order challenged below.[4]

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[2] So-called "foreign cars" are cars belonging to a railroad (hereafter "owning line") that are temporarily located on the lines of another railroad.

[3] All Class I railroads and a selected group of Class II railroads and switching and terminal companies were named by the Commission as respondents in its order initiating the investigatory portion of its proceeding, Docket Ex Parte No. 241. 29 Fed. Reg. 119 (1964). However, many short-line railroads and switching lines were not so designated, were not parties to the proceeding and will not be bound by the Commission's Order.

[4] Car Service Rules 1 and 2 are as follows:

"*Rule 1* Foreign cars, empty at a junction with the home road, must be:

(a) Loaded at that junction to or via home rails, or,
(b) Delivered empty at that junction to home road, except in instances where Rule 6 has been invoked, or unless otherwise agreed by roads involved.

Rule 2 Foreign empty cars other than those covered in Rule 1 shall be:

(a) Loaded to or via owner's rails.
(b) Loaded to a destination closer to owner's rails than is the loading station or delivered empty to a short line or switch loading road for such loading. (Car Selection Chart is designed to aid in so selecting cars for loading)
(c) Delivered empty to the home road at any junction subject to Rule 6.

[Footnote continued on page 3]

The administrative proceedings were begun in December of 1963 when the Commission undertook to study "the adequacy of railroad freight car supply with related subjects such as utilization, distribution, rules and practices being left to a later stage . . . ." 29 Fed. Reg. 119 (1964). That initial phase ended in June of 1964 when the Commission announced "the existence of a substantial inadequacy of ownership in more than one category of freight cars throughout the United States." 323 I.C.C. 48, 60 (1964).

In July of 1964, the Commission issued a formal notice of proposed rule making under § 1(14)(a), among others, of the Interstate Commerce Act, 49 U.S.C. § 1 (14)(a) (Supp. V), and broadened the inquiry into a general investigation of all phases of freight car ownership and use, looking toward "the prescription of rules designed to alleviate the problem . . . ." 29 Fed. Reg. 11653, 11654 (1964). During the course of this proceeding, a Commission witness proposed that certain car service rules, including rules 1 and 2, be prescribed for mandatory observance. The introduction of that proposal markedly altered the character of the proceedings. As both railroads and shippers recognized, mandatory observance of car service rules 1 and 2 would seriously

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[4] [Continued]

(d) Delivered empty to the road from which originally received under load, at the junction where received, EXCEPT that when handled in road haul service, cars of direct connection ownership may not be delivered empty to a road which does not have a direct connection with the car owner.

(e) Return empty to the delivering road when handled only in switching service." App. C, 156-57.

In addition to prescribing mandatory observance of these car service rules, the Commission's Order required the respondent railroads to prepare annual reports showing the results of an application of certain data to a car ownership formula approved by the Commission and further showing the steps, if any, taken to cure any indicated inadequacies.

disrupt both production and distribution capabilities of many shippers, including those of the present appellees.[5] Thus, in response to the proposal for mandatory observance of car service rules, at least 20 major shippers and shippers' organizations, including the present appellees, intervened in the proceeding and submitted evidence in opposition to the proposal.[6]

Following the receipt of evidence in the form of verified statements and replies, the proceeding was referred to a hearing examiner for the taking of testimony and cross examination. The hearing lasted approximately 50 days and produced nearly 6,000 pages of testimony. Thereafter, the Hearing Examiner prepared his recommended report and order in accordance with section 8 of the Administrative Procedure Act, 5 U.S.C. § 557 (1971). Following a careful review of all record evidence, he made a general finding that "mandatory rules would be of substantial detriment to rail carriers and shippers." App. A, 23.[7] As to the steel industry in particular, the Examiner found that the "necessary increase in switching would exceed the physical capabilities of [many plants] and [their] serving carriers beyond the point of rectification" and that, with respect to the forecasting of shipments that would be required by the rules, "the steel companies would be faced with a requirement impossible to meet." App. A, 23. He concluded his extensive report as follows:

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[5] As the district court observed: "Because the shippers and railroads normally are adversaries in Commission proceedings, that they are virtually united in opposing the mandatory rules is a phenomenon not without significance." App. A, 22.

[6] Initially, the only active participants in the proceeding were the respondent railroads, the American Short Line Railroad Association, the Secretary of Agriculture, the Public Utility Commissioner of Oregon, five shippers' organizations and Vulcan Materials Company. App. C, 30.

[7] The Jurisdictional Statement will be cited herein as "J.S. ——", and the Appendices to the Statement as "App. ——, ——".

> "Upon considering all of the evidence the hearing examiner finds that the record does not contain competent evidence upon which to base a conclusion as to the adequacy of freight car ownership; and that the adoption of the proposed car ownership formula, regulations, and car service rules has not been shown to be justified." [8]

Of all of the participating parties, only the Commission's Bureau of Enforcement filed exceptions to the Hearing Examiner's finding that prescription of car service rules for mandatory observance was not justified.[9] Nonetheless, Division 3 of the Commission, on August 19, 1969, issued a Report prescribing these car service rules for mandatory observance. App. C. Beginning with the premise that there existed a chronic shortage of general purpose freight cars—a premise which the Hearing Examiner had found was not supported by the evidence—the Commission concluded that the remedy for this shortage lay in prescribing car service rules, including rules 1 and 2, for mandatory observance. App. C, 87-88. In doing so the Commission recognized that imposition of these rules would not improve the utilization of freight cars "except insofar as return loading is compatible with the primary objective of increasing availability of cars to the owner." App. C, 65. The Commission also recognized that its order would exascerbate car shortages on car-poor roads, but nevertheless held that the needs of shippers thereby deprived of access to rail transportation "should not be met with equipment of carriers which obtained the cars to serve other shippers." App. C, 66.

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[8] Hearing Examiner Report, 63.

[9] In addition to the Bureau of Enforcement, only two other parties (National Industrial Traffic League and Vulcan Materials Company) filed any exceptions to the Hearing Examiner's Report. App. B, 31-32.

After exhausting their administrative remedies,[10] the appellee steel companies and the Institute brought suit in the Western District of Pennsylvania to review the portion of the Commission's Order requiring mandatory observance of car service rules 1 and 2. The AAR, the National Industrial Traffic League and the National Association of Shippers Advisory Boards intervened as plaintiffs. After the submission of extensive briefs and oral argument, the court, on March 18, 1971, entered an order making permanent an interlocutory injunction previously issued, restraining the Commission from enforcing that part of its Order that had been subject to review.[11]

The court below accepted *arguendo* the Commission's conclusion that a shortage of general purpose freight cars existed. Nonetheless, it enjoined the enforcement of compulsory car service rules for two reasons. First, the court concluded that the Commission had utterly failed to set out findings upon which mandatory observance of car service rules 1 and 2 was, or could be, based;[12] and second, the court held that the rules, when prescribed

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[10] A timely Petition for Reconsideration was filed on November 3, 1969 and a Petition for Further Postponement of the Effective Date of the Order of the Commission was filed on June 3, 1970. The relief requested in these pleadings was denied by orders of the Commission dated February 18, 1970 and June 30, 1970, respectively. In the process of reconsideration, the Commission postponed the effective date of its Order and provided for certain limited exceptions to mandatory observance of rules 1 and 2. *See* App. D, 172-74.

[11] Subsequently, a three-judge district court for the Middle District of Florida upheld the Commission's Order. *Florida East Coast Ry.* v. *United States*, 327 F. Supp. 1076 (1971). The Florida court considered not only the Commission's prescription of car service rules 1 and 2 for mandatory observance but also its adoption of a car ownership formula. *See* n. 4, *supra*.

[12] The court did not, therefore, reach the question whether there was substantial evidence to support the Commission's Order, particularly in view of the contrary findings of its Hearing Examiner, *cf.*, *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951).

for mandatory observance were not "reasonable" within the meaning of section 1(14)(a) of the Interstate Commerce Act, not only because of this absence of findings, but also because of the fact, conceded by Commission witnesses, "that there cannot be more than 80 per cent enforcement of regulations, the violation of which carries criminal penalties." App. A, 25.

ARGUMENT

1. The decision of the court below does not present any important issue of federal transportation law.[13] It does not question either the power of the Commission to cure car shortages through the prescription of reasonable car service rules, or, indeed, the merits of car service rules 1 and 2 themselves. To the contrary, the court below set aside the Commission's Order for two reasons, each of which is wholly unrelated to the existence *vel non* of a car shortage. First, the court held that the Commission had failed to articulate any findings that would support the imposition of compulsory car service rules. Second, the court concluded that because compliance with the rules was not possible, and noncompliance would be a criminal offense, the rules, when prescribed for mandatory observance, were not "reasonable." The court's decision with respect to these issues is plainly correct and should be summarily affirmed.

a. The purpose of the Commission's proceeding was to consider "the prescription of rules designed to alleviate the [freight car shortage] problem . . . ." 29 Fed. Reg. 11653, 11654 (1964). At the conclusion of its investigation, the Commission, disregarding the careful

[13] The Government stresses here the "seriousness of the current freight car shortage" that "plague[s] the nation." J.S. 8-9. But its argument in this respect is irrelevant to its request that the decision below be reviewed. That decision does not challenge the Commission's finding of a chronic car shortage. *See* App. A, 19.

findings of its Hearing Examiner that mandatory car service rules "would be of substantial detriment to rail carriers and shippers" and that they had "not been shown to be justified" (App. A, 23, 15), ordered the prescription of a set of car service rules, including rules 1 and 2, for mandatory observance. Although the Commission gave several explanations for its action, it failed to make findings to support that action.

First, the Commission asserted that returning cars to their owners would improve utilization by enabling those owners to provide for the needs of their shippers. App. C, 65. However, a necessary predicate for that conclusion is that the freight car needs of the shippers on those lines are greater than the needs of shippers on non-owning lines. Or, as the district court stated it, that "the shortage was more acute on the owner lines." App. A, 19. But there is no finding of such a greater shippers' need or greater car shortage on the owning lines.[14]

Second, the Commission reasoned that requiring the return of cars to their owners would

> "shift the responsibility for shortages to the railroad with inadequate ownership and compel such a railroad to increase its fleet . . . ." App. C, 65.

But there is no finding by the Commission that roads to whom the responsibility will be shifted are or would be financially capable of increasing their ownership of freight cars.[15] Nor is there any finding as to the effect

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[14] As to the absence of such a finding the Government now erroneously argues that the "issue was never raised before the Commission, and thus was not properly before the district court." J.S. 9. In fact, this issue was raised before the Commission. *See, e.g.*, Appellees' Petition for Reconsideration, dated Nov. 3, 1969, at 15; AAR Petition for Reconsideration, dated Nov. 3, 1969, at 13, 84.

[15] Indeed, the General Counsel for the Commission responded negatively to a question posed on oral argument by the court

upon shippers—in the form of increased rates—of the cost of such increased ownership—in the form of capital expenditures.

Third, the Commission explained that "[a]lthough mandatory observance of these two rules may create shortages on roads which own insufficient equipment, . . . the needs of shippers affected *should not* be met with equipment of carriers which obtained the cars to serve other shippers." App. C, 66 (emphasis added). But there are no findings as to which shippers will be so affected or the extent to which they will be disadvantaged by having their needs subordinated to the undetermined needs of shippers on car-rich lines. Moreover, the Commission's statement assumes—without finding—that there is a greater public interest in returning freight cars to the lines of their owners than there is in promptly moving freight awaiting shipment.

Finally, the Commission did not even make findings with respect to the benefit to be derived from its "affirmative, remedial action," other than to say that car service rules bear indirectly on the adequacy of the freight car supply. Most startling is the absence of a finding that mandatory observance of car service rules 1 and 2 will *in fact* alleviate the inadequacies of ownership that the Commission found to exist.

This case is thus much like *Palmer* v. *United States*, 75 F. Supp. 63 (D.D.C. 1947). There the Commission had prescribed certain penalty per diem charges whose purpose—like the purpose of the rules here prescribed by the Commission—was to require the return of foreign cars to the owning lines. In an opinion by Judge Prettyman, the court set aside the order on grounds directly applicable here:

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below as to whether there is "testimony on the record indicating the capacity of railroads to increase their fleets and to provide better maintenance for their cars?" Tr. Oral Arg. p. 13.

> "But, even if the Commission had the power it claims, the findings in its report are insufficient to support its order. We have examined the report with care, in an effort to find the obviously requisite determinations. There is no finding that the public interest in the return of cars to the owning railroads outweighs the public interest in the prompt movement of freight awaiting shipment at the initial unloading point of the car. There is no finding that an increase in the per diem would cause the return of a single car to its owner. There is no finding that in times of car shortage the necessities of non-owning railroads are less than those of the owning railroads. There is no finding that the present need for cars is on the owning roads rather than on the hiring roads. There is no finding that the roads which serve the large crop areas are owning roads. There is no finding as to what freight needs immediate movement." 75 F. Supp. at 75.

As this Court has recognized, the requirement that an agency make appropriate findings is not imposed "to insist on formalities and to burden the administrative process with ritualistic requirements." *Yonkers* v. *United States*, 320 U.S. 685, 692 (1944). Rather, it rests upon a recognition that

> "the courts cannot exercise their duty of review unless they are advised of the considerations underlying the action under review. . . . [T]he orderly functioning of the process of review requires that the grounds upon which the administrative agency acted *be clearly disclosed and adequately sustained.*" *SEC* v. *Chenery Corp.*, 318 U.S. 80, 94 (1943) (emphasis supplied).

This means that an "agency must make findings that support its decision and those findings must be supported by substantial evidence." *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168 (1962).

Having held that in this case the Commission failed to make the necessary findings, the district court did not

reach the question of whether there was substantial evidence in the record to support any such findings. Its conclusion as to the absence of findings is clearly correct.

Nor can the absence of findings be overcome by blind reliance on the expertise of the Commission or, as the Government states it, by the "Commission's policy determination." J.S. 9. Otherwise, as this Court has recognized in *Baltimore & Ohio R.R.* v. *Aberdeen & Rockfish R.R.*, 393 U.S. 87, 92 (1968):

> "The requirement for administrative decisions based on substantial evidence and reasoned findings—which alone make effective judicial review possible—would become lost in the haze of so-called expertise. Administrative expertise would then be on its way to becoming '"a monster which rules with no practical limits on its discretion."' *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 167. That is impermissible under the Administrative Procedure Act."

See also Schaffer Transportation Co. v. *United States*, 355 U.S. 83, 92 (1957).

b. The second ground for the decision of the court below was that car service rules 1 and 2, when prescribed for mandatory observance, are not "reasonable." In reaching that conclusion, the court relied not only upon the absence of findings and the failure of the Commission to demonstrate a rational connection between the asserted problems of car shortage and the proposed solution, but more specifically upon the Commission's acknowledgment that railroads and shippers cannot comply with the rules. Clearly a mandatory rule that cannot be complied with is not "reasonable." *See Iversen* v. *United States*, 63 F. Supp. 1001, 1006 (D.D.C.), *aff'd per curiam*, 327 U.S. 767 (1946).

The Commission's acknowledgment of the impossibility of compliance with rules 1 and 2 correctly reflects the

uncontradicted record evidence. This evidence was summarized by the Hearing Examiner as follows:

> "[A]ll of the Bureau witnesses agreed that perfect compliance with car service rules is impossible. One of [these] witnesses was of the opinion that compliance with the first four car service rules proposed would be good if it was made in 80 per cent of the instances those rules were applicable. In view of such opinion the witness believes that the proposed car service rules should be administered with 'strictly controlled flexibility.' The latter concept may beguile the imagination but it does not provide a comprehensible standard of enforcement." App. A, 24.

The lack of a comprehensible standard of enforcement is all the more disturbing where, as here, failure to comply with the Commission's Order carries with it criminal penalties.[16] Although such unpredictability in the application of criminal statutes is a defect of constitutional proportions, *see, e.g., United States* v. *Cohen Grocery Co.*, 255 U.S. 81 (1921), the court below did not decide the constitutional question. It did, however, advert to its "concerns about the ascertainable standard of guilt" in determining the "reasonableness of the proposed regulation." App. A, 25. Because carriers and shippers will be unable to comply with the rules, and their failure to comply will subject them to criminal penalties, the court's decision that the Commission's Order was not "reasonable" was clearly correct.[17]

2. There is no conflict of decisions requiring plenary review and resolution by this Court. As the Government

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[16] *See* Elkins Act, 49 U.S.C. § 41(1) (1964). *See also* 49 U.S.C. § 1(17) (1964) (penalty for carrier violations of car service rules); 49 U.S.C. § 10 (1964) (misdemeanor penalty for carrier violations).

[17] The Government does not deny that compliance with the Commission's Order is impossible. Rather, it suggests that this defect is cured by the availability of Commission—provided exceptions. *See* n. 10, *supra*. Even if the Commission were equipped to handle requests for exceptions in 20% of all car loadings each day, enforce-

correctly points out, a three-judge district court for the Middle District of Florida has, by upholding the Order here at issue, reached a result contrary to that reached by the court below. The conflict does not, however, give rise to any uncertainty as to whether mandatory observance of rules 1 and 2 is required of either carriers or shippers. The court below enjoined the Commission from enforcing these rules. That injunction establishes a uniform rule of national application. There is thus no possibility that the Commission's Order may be enforced in some locales but not in others.[18]

Nor is there any conflict on "important issues of federal transportation law." J.S. 8. As discussed above, the court below enjoined enforcement of the Commission's Order on the grounds (1) that the Commission failed to articulate findings to support its order; and (2) that rules 1 and 2, when prescribed for mandatory observance, were not "reasonable" where compliance with those rules is impossible. As to the first, the Florida court examined the Commission's Order only insofar as it was necessary to determine whether the Commission's "action was based on *substantial evidence*." App. F, 199 (emphasis added). The Florida court did not consider whether the Commission had made *findings* sufficient to support its Order. The fact that the Florida court adopted a restric-

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ment of the rules, as the court below found, would be "dependent upon a subjective determination of the field representatives of the Commission," App. A, 25. Accordingly, a carrier or shipper would not know *in advance* whether, as a practical matter, it would be necessary to seek an exception. *See Watkins* v. *United States*, 354 U.S. 178, 208 (1957).

[18] It should be noted that even if the decision below were reversed and the Commission's Order were permitted to take effect, car service rules 1 and 2 would not be "uniformly applied to all roads . . ." (J.S. 7), for contrary to the Government's assertion, the rules do not apply to "all the nation's railroads." *Ibid.* As noted, *supra*, n. 3, many railroads were not parties to the Commission proceeding and would not be bound by its Order.

tive approach to judicial review [19]—an approach that is inconsistent with the language of the Administrative Procedure Act and the holdings of this Court—hardly creates a conflict with the court below on an important issue of federal transportation law. And, the Florida court, by assuming that Commission-provided exceptions cured the admitted impossibility of compliance problem, never reached the alternative basis of the decision below—that rules with which compliance is not possible are not "reasonable," especially when noncompliance constitutes a violation of a criminal statute. Thus, this is not a situation in which "there is a real and embarrassing conflict of opinion and authority between the . . . courts" requiring consideration and resolution by this Court. *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393 (1923).

Finally, it should be noted that affirmance of the decision below will not in any way hamper the Commission in its efforts to remedy any car shortage problem it finds. By Commission order the record in this proceeding is still open. App. C, 88. The Commission is free at any time to reconsider the evidence now of record and make such findings to support its order as that evidence will permit. If the evidence of record is not sufficient to support the necessary findings, the Commission is free to receive additional evidence. Thus, there is no need to take the time of this Court when the Commission itself has ample power to correct the deficiencies found by the court below.

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[19] *See, e.g.*, App. F, 198-199.

CONCLUSION

For the reasons stated, the judgment below should be affirmed.

Respectfully submitted,

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October 15, 1971

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IN THE

Supreme Court of the United States

No. 71-227

UNITED STATES OF AMERICA, *et al.*,
Appellants,

v.

ALLEGHENY-LUDLUM STEEL CORP., *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MOTION TO AFFIRM

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IN THE

Supreme Court of the United States

No. 71-227

UNITED STATES OF AMERICA, *et al.*,
Appellants,

v.

ALLEGHENY-LUDLUM STEEL CORP., *et al.*,
Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MOTION TO AFFIRM

Appellee, The National Industrial Traffic League, pursuant to Rule 16 of the Rules of the Court, moves that the final judgment and decree of the United States District Court for the Western District of Pennsylvania be affirmed on the grounds that the lower court's decision is clearly correct and should be affirmed without further review.

OPINIONS BELOW

The opinion of the district court is set forth as Appendix A to the jurisdictional statement of the Appellants. The reports and orders of the Interstate Commerce Commission are reproduced in Appendices C-E therein.

JURISDICTION

The judgment of the three-judge district court was entered on March 18, 1971. Notices of appeal were filed by the appellants on May 17, 1971. (See Appendices G & H of the jurisdictional statement.) The jurisdiction of this court is based on 28 U.S.C. § 1253.

QUESTIONS PRESENTED

The primary and ultimate question presented is whether the district court was correct in enjoining the Commission from ordering the nation's railroads to observe certain car service rules requiring the return of freight cars to the owning railroad.

A determination of this question involves, at the least, these subsidiary questions:

1. Whether the court below correctly held that the Commission's order was not supported by adequate findings.

2. Whether the court below correctly held that the car service rules were unreasonable rules when prescribed for mandatory observance.

STATUTES INVOLVED

In addition to Section 1(14)(a) of the Interstate Commerce Act, 49 U.S.C. § 1(14)(a), (set forth at pages 3-4 of the Government's jurisdictional statement), this case involves Sections 1(17)(a) and 10(1) of the Interstate Commerce Act, 49 U.S.C. §§ 1(17)(a) and 10(1), as well as Section 1 of the Elkins Act, 49 U.S.C. §41(1). Also involved are the National Transportation Policy, 49 U.S.C. preceding § 1, and certain sections of the Administrative Procedure Act, 5 U.S.C. §§ 553, 556, 557 and 706. All of these provisions are set forth in Appendix A.

STATEMENT OF THE CASE

This proceeding originated nearly eight years ago as an effort by the Commission to determine the extent of and the reasons for the continuing failure of the nation's railroads to provide an adequate supply of freight cars. At the same time, the Commission proposed to examine possible solutions to the car supply problem.

In an order of July 29, 1964, the Commission began a fact-finding investigation of the adequacy of freight car supply with a view towards prescribing rules, if shown to be necessary. A very extensive record was developed, with participation by the Commission staff, railroad and shipper associations and individual railroads and shippers.

The hearing examiner, after considering the record, declined to recommend the prescription of mandatory car service rules. The Commission, by its Division 3, reversed the examiner's conclusion concerning the prescription of mandatory car service rules. It did this after finding that there was a car supply problem, a finding the examiner declined to make. (See pages 52-53 and 60-67 of the Government's jurisdictional statement.) Division 3 ordered prescription in spite of the overwhelming opposition from interested parties contained in the administrative record. The Commission affirmed the Division's decision in an order entered February 18, 1970.

On judicial review, the district court enjoined the Commission from enforcing Car Service Rules 1 and 2, on the grounds that there were not adequate findings in the report to support the Commission's order and that the rules failed to meet the test of reasonableness. (See Appendix A to the jurisdictional statement, page 13.) In particular, the court found (a) that there was no finding of a specific freight car shortage on the car-owning railroads; (b) that the Commission failed to consider the financial effect the car service rules would have on both the railroads and shippers and (c) that liability for criminal penalties for violation of the car service rules would be unreasonable when complete compliance could not be expected by the Commission.

ARGUMENT

The decision of the court below is so obviously correct that it should be affirmed without further review by this Court.

The National Transportation Policy, 49 U.S.C. preceding Section 1, requires the Commission to administer the Interstate Commerce Act "to the end of developing, coordinating and preserving a national transportation system by water, highway and rail . . . adequate to meet the needs of the commerce of the United States . . . ." In the past, this Court has ". . . made it clear that this policy is the yardstick by which the correctness of the Commission's actions will be measured." *Schaffer Transportation Co. v. United States*, 355 U.S. 83, 88 (1957).

The National Industrial Traffic League (hereinafter referred to as the League) is the largest diversified shipper organization in the United States. It is readily apparent that the League and its members have a keen interest in the adequacy of the supply of freight cars provided by the nation's railroads. The League has actively participated in this case since its inception at the Commission. It has submitted evidence through Mr. Frank L. Merwin, a Vice President of American Smelting and Refining Co., with an extensive background in transportation and traffic management. At the time he appeared before the Commission, Mr. Merwin was Chairman of the League's Executive Committee, and he is currently serving as its President.

Because of its interest in obtaining effective solutions to the car supply problem, the League has also participated in another major proceeding before the Commission.[1]

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[1] Docket Ex Parte Nos. 252 and 252 (Sub-No. 1), *Incentive Per Diem Charges–1968*, 332 I.C.C. 11 (1967), 337 I.C.C. 183 (1969), 337 I.C.C. 217 (1970), 339 I.C.C. 627 (1971), sustained on review *sub. nom. Long Island R. Co. v. United States*, 318 F. Supp. 490 (E.D.N.Y., 1970), and reversed and remanded on review *sub. nom. Florida East Coast Ry. Co. v. United States*, 322 F. Supp. 725 (M.D. Fla., 1971), appeal docketed June 14, 1971, No. 70-279.

When viewed in the context of their continuing efforts to alleviate the car supply problem, the opposition of the League and other shippers to the Commission-ordered mandatory observance of Car Service Rules 1 and 2 takes on special meaning.

As the opinion of the court below said:

> "Absent isolated endorsements, the shipping public was generally opposed to the mandatory rules . . .
>
> "Witnesses for the National Industrial Traffic League, the largest diversified shippers' organization in the United States, testified that, far from advancing effective car utilization, mandatory enforcement would seriously obstruct and undermine railroad car utilization, and that the necessary consequence would be delay, waste in railroad operations, and disruption of shippers' production and distribution program."[2]

It is apparent that the mandatory observance of Car Service Rules 1 and 2 would be wholly antithetical to the requirements of the National Transportation Policy. There is no finding in the Commission's report that such mandatory observance would improve the freight car supply, either in the short or the long run. See *Burlington Truck Lines v. United States*, 371 U.S. 156, 167-169 (1962). In such a case, the district court was required by the Administrative Procedure Act to set aside the Commission's action.[3] See *Baltimore & O. R. Co. v. Aberbeen & R.R. Co.*, 393 U.S. 87, 91 (1968). On this basis alone the judgment of the court below should be affirmed.

The arguments presented by the appellants in their jurisdictional statement that the court below erred in enjoining the car service rules are not persuasive of the need for further review. Appellants place great weight on the Com-

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[2] See pages 21-23 of the jurisdictional statement. See also notes 6 and 7 therein to the opinion of the court below.

[3] 5 U.S.C. § 706(2)(E).

mission's "policy determination" and the "exercise of its judgment and discretion" (jurisdictional statement, page 9). But it has already been shown that this exercise of expertise is unsupported by adequate findings. The teachings of *Baltimore & O. R. Co. v. Aberdeen & R.R. Co., supra,* at page 92, are especially pertinent on this point:

> "The requirement for administrative decisions based on substantial evidence and reasoned findings—which alone make effective judicial review possible—would become lost in the haze of so-called expertise. Administrative expertise would then be on its way to becoming '"a monster which rules with no practical limits on its discretion."' Burlington Truck Lines v. United States, 371 U.S. 156, 167. That is impermissible under the Administrative Procedure Act."

These principles preclude the Commission from relying in this case on its expertise in the absence of adequate findings in its report.

The decision of the court below should also be affirmed without further review because it correctly found that the car service rules were not "reasonable" as required by 49 U.S.C. §1(14)(a). This requirement has been previously construed to mean that the regulatory measure must have "a real and substantial relation to the object sought to be obtained."[4]

There can be no question that Car Service Rules 1 and 2 fail to meet these criteria. Not only would the mandatory observance of the rules be unreasonable *per se*, but, as the court below pointed out, the Commission report and order has failed to deal carefully with the substantial financial impact enforcement of the rules would have on both railroads and shippers. (See pages 21-23 of the jurisdictional statement.)

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[4] *Palmer v. United States,* 75 F. Supp. 63, 68 (D.D.C., 1947).

The court below also considered the lack of "ascertainable standards of guilt" when violators of the regulation would be subject to criminal penalties to be indicative of unreasonableness. The potential penalties range from $100 to $500 fines for each offense (plus $50 per day for each day it continues)[5] through a $5,000 fine[6] or two years imprisonment.[7] Yet the witness for the Commission's Bureau of Enforcement conceded that they would not expect more than 80% compliance.[8] This is clearly an unreasonable scheme of regulation.[9]

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[5]Section 1(17)(a).

[6]Section 10(1).

[7]Section 1 of the Elkins Act.

[8]Examiner's report page 24, quoted in opinion of court below, see page 24 of jurisdictional statement.

[9]The Government points out that procedures are available to obtain exceptions to the rules. These procedures first became part of the prescribed rules when the entire Commission reviewed the decision of Division 3. Again, the lack of reasoned findings and substantial evidence to support these procedures for obtaining exceptions, which were never considered by the parties, the examiner or Division 3, is obvious. The principles of the *Baltimore & O. R. Co. v. Aberdeen & R. R. Co.* decision, *supra*, make these procedures wholly unacceptable.

CONCLUSION

Wherefore, Appellee The National Industrial Traffic League respectfully submits that the decision of the court below is so clearly correct as not to require further review by this Court. Appellee respectfully moves the Court to affirm the judgment and decree entered by the United States District Court for the Western District of Pennsylvania.

Respectfully submitted,

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October 15, 1971

PROOF OF SERVICE

I, John F. Donelan, Counsel for Appellee hereby certify that on the 15th day of October, 1971, I served the foregoing Motion to Affirm upon all parties of record by mailing 3 copies thereof, first class postage prepaid, in accordance with Rules 33(1) and 33(2)(a) of this Court, as follows:

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APPENDIX A

STATUTES

49 U.S.C. §§ 1(17)(a) and 10(1)

§ 1(17)(a) The directions of the Commission as to car service and to the matters referred to in paragraphs (15) and (16) may be made through and by such agents or agencies as the Commission shall designate and appoint for that purpose. It shall be the duty of all carriers by railroad subject to this part, and of their officers, agents, and employees, to obey strictly and conform promptly to such orders or directions of the Commission, and in case of failure or refusal on the part of any carrier, receiver, or operating trustee to comply with any such order or direction such carrier, receiver, or trustee shall be liable to a penalty of not less than $100 nor more than $500 for each offense and $50 for each and every day of the continuance of such offense, which shall accrue to the United States and may be recovered in a civil action brought by the United States: *Provided, however*, That nothing in this part shall impair or affect the right of a State, in the exercise of its police power, to require just and reasonable freight and passenger service for intrastate business, except in so far as such requirement is inconsistent with any lawful order of the Commission made under the provisions of this part and except as otherwise provided in this part.

§ 10(1) That any common carrier subject to the provisions of this part, or, whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, who, alone or with any other corporation, company, person, or party, shall willfully do or cause to be done, or shall willingly suffer or permit to be done, any act, matter, or thing in this part prohibited or declared to be unlawful, or who shall aid or abet therein, or shall willfully omit or fail to do any act, matter, or thing in this part required to be done, or shall cause or willingly suffer or permit any act, matter, or thing so directed or

required by this part to be done not to be so done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this part for which no penalty is otherwise provided, or who shall aid or abet therein, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of the United States within the jurisdiction of which such offense was committed, be subject to a fine of not to exceed five thousand dollars for each offense: *Provided*, That if the offense for which any person shall be convicted as aforesaid shall be an unlawful discrimination in rates, fares, or charges for the transportation of passengers or property or the transmission of intelligence, such person shall, in addition to the fine hereinbefore provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court.

Section 1, Elkins Act, 49 U.S.C. § 41(1)

That anything done or omitted to be done by a corporation common carrier, subject to the Act to regulate commerce and the Acts amendatory thereof, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said Acts or under this Act, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said Acts or by this Act with reference to such persons, except as such penalties are herein changed. The willful failure upon the part of any carrier subject to said Acts to file and publish the tariffs or rates and charges as required by said Acts, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than one thousand dollars nor more than twenty thousand dollars for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars: *Provided*, That any person, or any officer or director of any corporation subject to the provisions of this Act, or the Act

to regulate commerce and the Acts amendatory thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court. Every violation of this section shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed, or through which the transportation may have been conducted; and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein.

National Transportation Policy, 49 U.S.C. preceding Section 1

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discrimintions, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Administrative Procedure Act, 5 U.S.C.
Sections 553, 556, 557 and 706

Sec. 553. Rule Making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved–

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include–

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply–

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation.

After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

Sec. 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record basis of decision

(a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

(b) There shall preside at the taking of evidence—

(1) the agency;

(2) one or more members of the body which comprises the agency; or

(3) one or more hearing examiners appointed under section 3105 of this title.

This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee

may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

(c) Subject to published rules of the agency and within its powers, employees presiding at hearings may—

(1) administer oaths and affirmations;

(2) issue subpenas authorized by law;

(3) rule on offers of proof and receive relevant evidence;

(4) take depositions or have depositions taken when the ends of justice would be served;

(5) regulate the course of the hearing;

(6) hold conferences for the settlement or simplification of the issues by consent of the parties;

(7) dispose of procedural requests or similar matters;

(8) make or recommend decisions in accordance with section 557 of this title; and

(9) take other action authorized by agency rule consistent with this subchapter.

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial

licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

Sec. 557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record

(a) This section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title.

(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554 (d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule. When the agency makes the decision without having presided at the reception of the evidence, the presiding employee or an employee qualified to preside at hearings pursuant to section 556 of this title shall first recommend a decision, except that in rule making or determining applications for initial licenses—

(1) instead thereof the agency may issue a tentative decision or one of its responsible employees may recommend a decision; or

(2) this procedure may be omitted in a case in which the agency finds on the record that due and timely execution of its functions imperatively and unavoidably so requires.

(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—

(1) proposed findings and conclusions; or

(2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and

(3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

Sec. 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be–

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(C) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party and due account shall be taken of the rule of prejudicial error.

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No. 71-227

In the Supreme Court of the United States

OCTOBER TERM, 1971

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

ALLEGHENY-LUDLUM STEEL CORPORATION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MEMORANDUM FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION IN OPPOSITION TO THE MOTIONS TO AFFIRM

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In the Supreme Court of the United States

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1. If the responsibility of the Interstate Commerce Commission for assuring to the shippers of this Nation the availability of railroad freight cars were limited to regulating the distribution of existing freight cars to provide for maximum utilization, we might agree with the view that the Car Service Rules at issue should not have been promulgated for mandatory observance, for, as the appellee railroads correctly note (Motion to Affirm of Association of American Railroads, p. 11), the pattern of movements that the Rules would impose is not one that normally would

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obtain during periods of short supply. However, under Sections 1(10), 1(13) and 1(14)(a) of the Interstate Commerce Act, 49 U.S.C. 1(10), 1(13) and 1(14)(a), the Commission's concern must be with the supply of cars as well as their distribution. Appellees fail to recognize that in the orders under attack the Commission was addressing itself primarily to the problems of supply.

Similarly, the appellee steel companies mistake the Commission's position; contrary to their assertion (Motion to Affirm of Allegheny-Ludlum Steel Corporation, *et al.*, p. 8), the Commission specifically acknowledged that Car Service Rules 1 and 2 "are not designed to improve the utilization of freight cars * * *" (J.S. App. 65). And, again, contrary to their assertion (Motion to Affirm of Allegheny-Ludlum Steel Corporation, *et al.*, p. 8), the Commission did find that the "continuing relocation of cars on owner's lines," which the mandatory observance of these Car Service Rules would accomplish, "is of major importance to the maintenance of an adequate car supply" (J.S. App. 63), and explained the reasons for this finding (J.S. App. 65–66).

This failure to distinguish between the problems of car supply and car distribution is also reflected in the appellees' emphatic reliance on *Palmer* v. *United States*, 75 F. Supp. 63, 68 (D. D.C.), a case in which the court found that the Commission's order was not suited to promoting the efficient distribution of rail-

road freight cars, as had been the stated purpose of the order there at issue.[1]

2. Appellees' effort to deny the existence of a conflict between the decision below and the decision in *Florida East Coast Railway Company* v. *United States*, 327 F. Supp. 1076 (M.D. Fla.) (J.S. App. 184–203), does not withstand analysis. The *Florida* court's disagreement with the decision of the court below was substantive and complete (J.S. App. 200). To say that the decisions of the *Florida* court and of the court below are reconcilable because the former focused upon the substantiality of the evidence supporting the findings of the Commission, whereas the latter examined only the sufficiency of those findings, is in reality to acknowledge that the findings that the court below would require the Commission to make as a matter of law would not have been supported by the record in either case. In effect, the court below held that, as a matter of law, the prescription of mandatory Car Service Rules 1 and 2 can be sustained only upon a finding that the car shortages predominated on the lines of the owning railroads and upon a further finding that the non-owning railroads are financially able to augment their fleets; the *Florida* court held that these findings are unnecessary.

We submit that the *Florida* court's decision is correct; neither finding is required to support the Com-

[1] The *Palmer* decision was overruled by subsequent congressional enactment. 80 Stat. 168. See S. Rep. 386, 89th Cong., 1st Sess. 6–7 (1965); H. Rep. 1183, 89th Cong., 1st Sess. 6 (1965).

mission's action. Basic to the Commission's action was its belief, for which there is support in the record, that the incentive for procuring cars is dampened to the extent that a railroad is denied the use of its equipment during periods of short supply (J.S. App. 55). Similarly, the Commission believed that making it more difficult for the car-deficient railroads to use the cars of other roads during such periods will encourage them to add to their equipment, even at the risk of foregoing other and perhaps otherwise more attractive investment opportunities (*ibid.*).

3. Appellees assail the reasonableness of the Commission's prescription of Car Service Rules 1 and 2 for mandatory observance by referring to the testimony of witnesses before the Commission to the effect that more than 80 percent compliance could not be expected. They do not advise the Court, however, that this testimony was offered without taking into consideration the exceptions to the Rules that can be obtained under Note B to Car Service Rules 1 and 2 (J.S. App. 157–158) and by Rule 19 (J.S. App. 172). There is nothing of record to suggest that substantial compliance with the Rules, conditioned to permit exceptions, is not feasible.

4. Finally, appellees argue (Motion to Affirm of Association of American Railroads, p. 16; Motion to Affirm of Allegheny-Ludlum Steel Corporation, *et al.*, p. 13) that the Commission's report and orders "do not apply to 'all the nation's railroads.' " But the report and orders by their terms apply to all Class I railroads,

which are those with annual operating revenues of $5,000,000 or more. 49 C.F.R. 1240.1.

For the reasons stated herein and in our Jurisdictional Statement, and in order to resolve the conflict between the court below and the *Florida* court, the motions to affirm should be denied and probable jurisdiction should be noted.

Respectfully submitted.

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v.

ALLEGHENY-LUDLUM STEEL CORPORATION, ET AL., *Appellees*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR APPELLEE ASSOCIATION OF AMERICAN RAILROADS

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February, 1972

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR APPELLEE ASSOCIATION OF AMERICAN RAILROADS

This brief is filed on behalf of Appellee, the Association of American Railroads (hereinafter sometimes referred to as Association), pursuant to the Rules of this Court.

OPINION BELOW

The opinion of the district court (J.S. App. 13-26)[1] is reported at 325 F.Supp. 352.

[1] J.S. App. refers to the Appendix to the Government's Jurisdictional Statement.

JURISDICTION

The judgment of the district court (J.S. App. 27) was entered on March 18, 1971, setting aside and permanently enjoining enforcement of certain portions of a report and orders entered by the Interstate Commerce Commission in an administrative proceeding identified as Ex Parte No. 241—*Investigation of Adequacy of Freight Car Ownership, Utilization, Distribution, Rules and Practices*, 335 I.C.C. 264. (J.S. App. 28-183.) Notices of appeal were filed by the Interstate Commerce Commission and United States (hereinafter sometimes referred to collectively as the Government) on May 17, 1971. (J.S. App. 204-207.) Probable jurisdiction was noted by this Court on November 9, 1971. (App. ____.)[2] The jurisdiction of this Court is conferred by 28 U.S.C. §1253.

STATUTES INVOLVED

The pertinent statutes involved are: Section 1(14)(a) of the Interstate Commerce Act, 49 U.S.C. §1(14)(a) (App. ____); the National Transportation Policy, 49 U.S.C. preceding sections 1, 301, 901 and 1001 (App. ____); and Sections 553, 556, 557 and 706 of the Administrative Procedure Act, 5 U.S.C. §§ 553, 556, 557 and 706 (App. ____).

QUESTIONS PRESENTED

1. Whether the court below was correct in holding that the Commission's order prescribing mandatory Car Service Rules 1 and 2 does not meet the statutory tests of reasonableness.

2. Whether the court below was correct in setting aside and enjoining enforcement of the Commission's order for lack of essential and adequate findings.

3. Whether the action of the court below in setting aside and enjoining enforcement of the Commission's order was

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[2] App. refers to the Joint Appendix to Briefs filed with this Court.

correct on grounds of lack of support by substantial evidence of the whole record and failure to comply with other requirements of the Administrative Procedure Act and of the National Transportation Policy.

At this point it is appropriate to comment on the Government's statement of the questions presented. The subsidiary questions in the Government's brief (p. 2) contain statements that unintentionally might tend to mislead. The court below did not hold that there was a "general and pervasive shortage of freight cars on virtually all railroads," but simply referred to the Commission's finding of a freight car shortage that, in terms used by Commission counsel in oral argument, was "all pervasive." (J.S. App. 19.) Its ruling was not made in the terms of an "absence of explicit findings of shortages on individual railroads." Referring to the charts and tables in the Commission's report, the court said: "This may constitute substantial evidence of a general car shortage, but it does not support a specific finding of special car shortages on the owner lines." (J.S. App. 19-20.) Further, the court below did not hold "that the practical necessity, recognized and provided for by the Commission, for some exceptions in the day-to-day administration of the car service rules renders the rules invalid." The court said: "The admission that there cannot be complete observance of the mandatory rules is a factor which we may consider in determining the reasonableness of a regulation which is self-styled mandatory." (J.S. App. 25.)

STATEMENT

This is an appeal from a final judgment entered on March 18, 1971, by a three-judge U.S. District Court, 325 F. Supp. 352 (J.S. App. 13-27), setting aside and enjoining enforcement of certain portions of a report and orders entered by the Commission in a proceeding entitled Ex Parte No. 241, *Investigation of Adequacy of Railroad Freight Car Ownership, Utilization, Distribution, Rules and Practices, supra.* (J.S. App. 28-183)

Proceedings Before The Commission

By order of December 20, 1963, this investigation was instituted by the Commission, on its own motion, "for the purpose of ascertaining the adequacy of railroad freight car ownership." All Class I railroads and a selected group of Class II railroads and switching and terminal companies were made respondents. The investigation was conducted without benefit of oral hearing, and on June 18, 1964, Division 3 of the Commission entered an interim report (323 I.C.C. 48) in which it concluded that further study was necessary. By order of July 29, 1964 (M.A. App. 18-28)[3] Division 3 of the Commission broadened the investigation "for the purpose of obtaining detailed and precise information on all phases of freight car ownership, utilization, distribution, rules and practices, which in any manner contribute to or affect the chronic freight car shortage problem, with the view (1) to consideration of the prescription of rules designed to alleviate the problem, and (2) to consideration of the issuance of an order or direction under the provisions of Section 1(13) of the Interstate Commerce Act." This order again named only Class I railroads and a selected group of Class II railroads and switching and terminal companies as respondents (M.A. App. 22-28).[4]

Verified statements, reply statements, and exhibits were filed with the Commission.[5] Evidentiary hearings were held before a Hearing Examiner, beginning on March 28, 1967,

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[3] M.A. App. refers to the Appendix of this Appellee's Motion to Affirm.

[4] By its express terms the Commission's order here involved runs only against such named railroads. Many common carrier railroads, which originate and terminate freight traffic and are under the jurisdiction of the Commission, are not subject to the order.

[5] The evidence before the Commission was introduced through initial verified statements (VS), reply verified statements (RVS), exhibits (Exh.), and oral testimony transcript (Tr.). The identification numbers shown in this brief are those assigned to the documents by the Commission.

and ending on August 11, 1967. In a recommended report evidencing meticulous and comprehensive review of the record, as well as observation of the witnesses, the Examiner concluded that:

> Upon considering all of the evidence the hearing examiner finds that the record does not contain competent evidence upon which to base a conclusion as to the adequacy of freight car ownership; and that the adoption of the proposed car ownership formula, regulations, and car service rules has not been shown to be justified. (Exp. Rep., p. 63, App.).

Approximately eighteen months later, largely and sometimes entirely, ignoring the Examiner's recommended report and findings, Division 3 entered a report (J.S. App. 28-166) and order prescribing the car service rules here in issue for mandatory observance by the theretofore specifically named railroads (J.S. App. 167-68).

Petitions for Reconsideration were filed by the Association, numerous individual railroads and shippers, and shipper organizations. By order of February 18, 1970 (J.S. App. 169-79), the Commission denied the petitions, adopted an exception provision as its Rule 19, and ordered the prescribed car service rules to become effective March 27, 1970. The effective date with respect to Rules 1 and 2 was postponed to July 1, 1970.

Proceedings Before The Court Below

On June 23, 1970, fifteen steel companies and the American Iron and Steel Institute filed this action to enjoin and set aside the Commission's order to the extent it required mandatory observance of Car Service Rules 1 and 2. The Association, the National Industrial Traffic League, and the National Association of Shippers Advisory Boards intervened as parties plaintiff. Following the issuance of a restraining order against the Commission, the cause proceeded to a determination on the merits.

The court below unanimously concluded that the Commission's order prescribing Rules 1 and 2 for mandatory observance did not meet the statutory tests of reasonableness, and pointed to three major deficiencies inherent in the Commission's report: "(1) a failure to find a specific freight car shortage in the owner-lines; (2) a failure to consider the financial effects upon the [non]owner-lines and the shipping public; and (3) a concession that there cannot be more than 80 percent enforcement of regulations, the violation of which carries criminal penalties." (J.S. App. 25.) The court then permanently enjoined the Commission "from enforcing or attempting to enforce that part of the orders of the Commission entered August 21, 1969, February 18, 1970, and March 18, 1970, which direct and require respondent railroads to comply effective July 1, 1970, with Rules 1 and 2." (J.S. App. 27.)

SUMMARY OF ARGUMENT

The questions presented to this Court center on the Commission's improper exercise of the authority granted to it by Congress in Section 1(14)(a) of the Interstate Commerce Act, (App.). No one has questioned, and the judgment of the court below has not impaired, the Commission's power, "after hearing" to establish "reasonable" car service rules. What we do say is that the decision of the court below was correct for the reasons that the Commission's prescription of mandatory Car Service Rules 1 and 2 lacks rational basis and is unreasonably harmful to the railroads and shippers; essential and adequate findings are lacking; support by the substantial evidence of the whole record is wanting; and the Commission failed to observe the statutory requirements, procedural and substantive, of the Administrative Procedure Act and the National Transportation Policy.

The sole proponent of mandatory car service rules was the Commission's Bureau of Enforcement. Opposition to prescription of mandatory car service rules was virtually

unanimous by the shippers, shippers' trade associations and the railroads. In rebuttal statements, and by extensive cross-examination, the Bureau's supporting data was shown to have no substantial evidentiary value. The evidence of record established that mandatory car service rules would have harmful and detrimental effects upon the railroads and the shipping public. The Hearing Examiner concluded that the record did not contain competent evidence upon which to base a conclusion as to the adequacy of freight car ownership, or the prescription of car service rules. Without adequate explanation, and notwithstanding the absence of essential and adequate findings of fact, and lacking support of the substantial evidence of record, the Commission reversed the Examiner. The court below clearly was correct in setting aside and permanently enjoining the Commission's prescription of mandatory Car Service Rules 1 and 2, and its judgment should be affirmed by this Court.

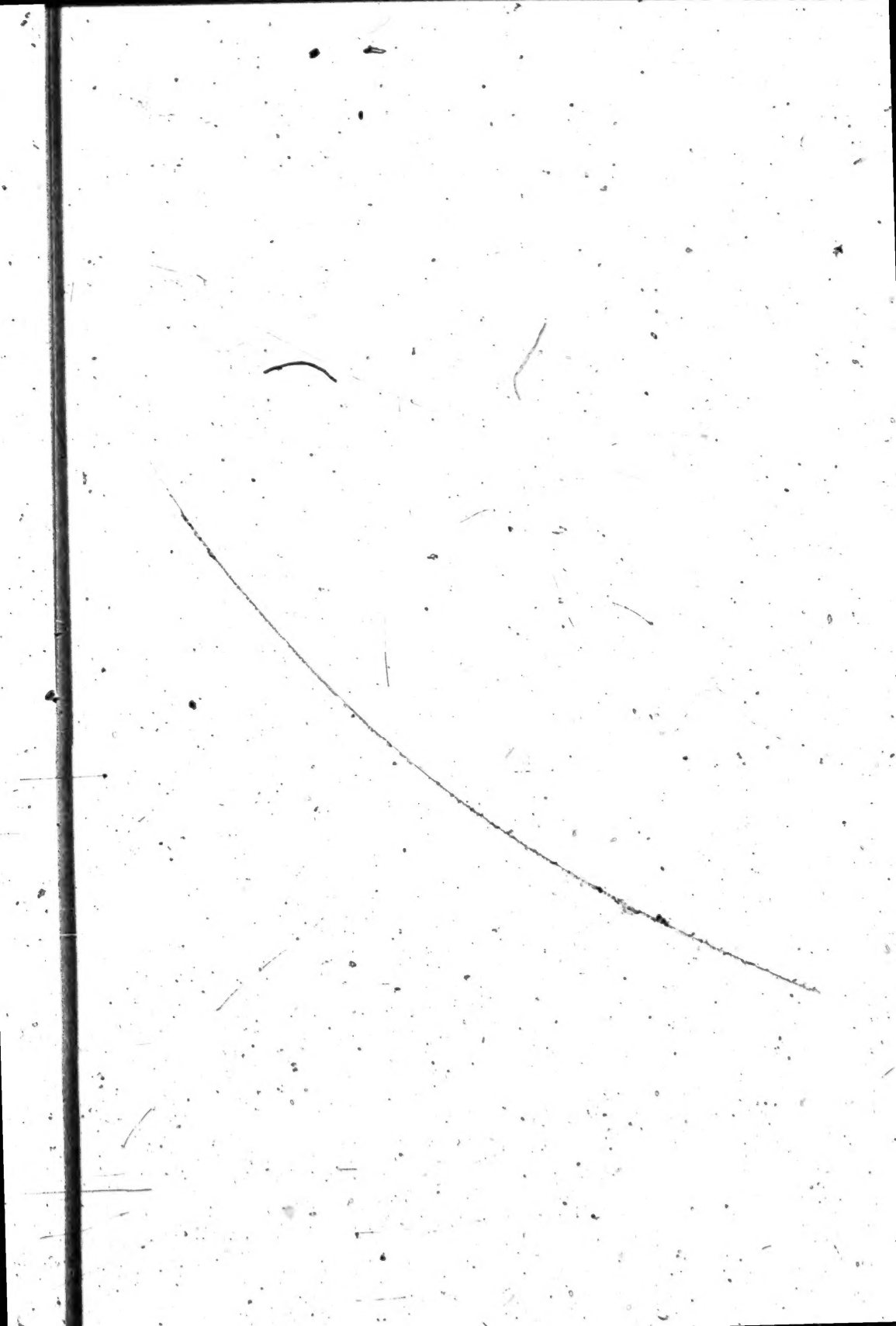
ARGUMENT

The court below was fully aware of and responsive to its role in judicial review of the Commission's decision. It is appropriate to note some of the salient aspects of that review. It began with a recognition of statutory requirements, procedural and substantive, with which the Commission's order must comply, such as the standard of reasonableness required by Section 1(14)(a) of the Interstate Commerce Act (App.) and the "substantial evidence" test of the Administrative Procedure Act, 5 U.S.C. §706(2)(E) (App.). (J.S. App. 13.) Other principles of applicable law were noted. (J.S. App. 16.) The review continued with an examination of the evidence of the "whole record", including the Examiner's findings and conclusions. (J.S. App 15, 18-19, 23-25.) The Commission's report was then reviewed, and compared with the Examiner's report, to determine if essential and adequate findings were present to support its order. (J.S. App. 18.) The court moved on to a determination that, in light of the "whole record", the

Commission's mandatory prescription of Car Service Rules 1 and 2 was invalid.

The court emphasized that a most careful review of the record was required by the Commission's rejection of the comprehensive findings and conclusions of the Examiner with a minimum of explanation. (J.S. App. 18.) In reviewing the extensive record the court was concerned with the Commission's "spartan" findings. (J.S. App. 18.) Accepting the Commission's stated "primary objective" of the prescribed rules, *i.e.*, to increase the availability of freight cars to the car owner (thereby exerting economic pressure on the non-owners to purchase freight cars), the court searched in vain for a finding of a specific freight car shortage on the owner lines, or of the magnitude (absolute or relative) of any owner-lines shortage, or that the owner lines needed the cars or wanted them returned. (J.S. App. 19-20.)

Accepting as fact, for the moment, the Commission's argumentative reasoning that the railroads believed to be deficient in ownership would be forced to purchase cars, the court looked again in vain for findings as to which railroads they were and that such railroads were financially able to do so. (J.S. App. 20-21.) Probing deeper, the court looked at the ultimate effect that mandatory rules would have upon the railroads and shipping public. It noted the voluminous and uncontroverted evidence by railroads and shippers of the harmful effects that would flow from mandatory rules. (J.S. App. 21-23.) In so doing, the court compared the cavalier treatment accorded this evidence by the Commission with the Examiner's considered analysis and evaluation of that evidence. (J.S. App. 23, fn. 7). The court expressed its concern over the admitted fact that it was "unreasonable and, indeed, impossible to expect total compliance with the rules" (J.S. App. 24), and found it unnecessary "to reach the constitutional question" inherent in the imposition of statutory penalties under such circumstances. (J.S. App. 25.)



The meticulous care of the court below to comply with the guidelines and directions enunciated by this Court in *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, 492-497 (1951), is to be contrasted to the summary review accorded by the Florida court in *Florida East Coast Ry.* v. *United States*, 327 F.Supp. 1076 (M.D. Fla. 1971). (J.S. App. 184-203.)

In an apparent effort to overcome the deficiencies in the Commission's report and order, noted by the court below, the Government in its brief here (p. 37) urges controlling deference to the judgment and discretion of the Commission and its expertise. However, to do so on the basis of this record would make effective judicial review impossible and administrative expertise "a monster which rules with no practical limits on its discretion." *B. & O. R. Co.* v. *Aberdeen & R. R Co.* 393 U.S. 87, 92 (1968); *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 167 (1962).

I

The Commission's Order Does Not Meet The Tests Of Reasonableness.

In enacting the Administrative Procedure Act, 5 U.S.C. 551, *et seq.*, Congress imposed greater responsibility upon the courts to review the reasonableness and fairness of administrative agency decisions. *Universal Camera Corp.* v. *N.L.R.B., supra*, at 490. In the present case there is an additional and special statutory requirement of reasonableness with which this Court must be concerned, 49 U.S.C. §1(14)(a) (App.).

Judicial concepts of what is "reasonable" with respect to car service rules have been expressed in several decisions. Such a rule must serve a useful purpose, improve car service, and not be harmful or wasteful. *Atlantic Coast Line* v. *United States*, 112 F. Supp. 594, 597 (Ct. Cl. 1953). The rule must have a real and substantial relation to the objective sought to be attained and must be susceptible of being

complied with. *Palmer* v. *United States,* 75 F. Supp. 63, 68 (D.D.C. 1947); *Iversen* v. *United States,* 63 F. Supp. 1001, 1006 (D.D.C. 1946), affirmed *per curiam,* 327 U.S. 767 (1946). Mandatory prescription of Car Service Rules 1 and 2 does not meet the statutory tests of reasonableness since such action will not improve freight car service, utilization or supply; will be detrimental and harmful to the railroads and shipping public; and cannot be fully complied with.

A. *Imposing Mandatory Observance Of Car Service Rules 1 And 2 Will Not Improve Freight Car Service, Utilization, Distribution, Or Supply.*

The Government admits that improvement of freight car service, utilization, or distribution was not the intention or purpose in prescribing the rules. (Government Brief, p. 14.) The Government also states that were the Commission concerned only with the distribution of existing freight cars to provide for maximum utilization it might agree that Car Service Rules 1 and 2 should not have been promulgated for mandatory observance since the pattern of movements that mandatory imposition of the rules would create is not one that normally would obtain during periods of car shortages. It is said that here the Commission was addressing itself primarily to the problems of *supply.* (Memorandum In Opposition To Motions To Affirm, pp. 1 and 2).

Implicit in the above admission by the Government is the proposition that, in times of car shortages, maximum utilization of the existing car fleet (as the public interest so obviously requires) is not a matter of primary concern. That such must be the Government's position is made apparent by the Commission's use of its determination in this case of the existence of a car shortage as the sole basis to prescribe rules which its Memorandum admits would establish a pattern of car movement contrary to the achievement of maximum utilization of the existing freight car fleet during a shortage.

The Commission, in past times of car shortage, has recognized an obligation on the railroads to achieve, without regard to car ownership, maximum utilization of the existing car fleet, pointing out that, "[i]n periods like the present, when the car supply falls short of demands, maximum tonnage is handled by permitting cars to be reloaded immediately after a load is removed, without regard to ownership of cars or destination of shipments." *Car Service—Freight Cars*, 268 I.C.C. 687, 690 (1947). Indeed, the Government, at page 2 of its brief below, argued that:

> Given shortages, it is obvious that railroads must follow such practices as will make the best use of what is available.

The court below should not be faulted if, as argued by the Government, it failed to comprehend the Commission's position. It was that in a car shortage situation the Commission may issue an order which does not require railroads to make the best use of what cars are available in order to relieve the shortage but instead requires a pattern of car movements which aggravates the shortage, on the theory that such an order might cause railroads over a period of time to buy more cars.

In no sense then can the Commission's order be defended on the ground that it has a beneficial effect on car utilization or distribution. In fact, the testimony of most witnesses in this proceeding, including Bureau Witness Kline, is that full compliance with car service rules would result in less efficient railroad operations. (Tr. 254, App. · ·.) There remains the sole question of whether the Commission's order can be held to be reasonable because of its assumed effect on freight car "supply" as that term is used by the Government. As so used the term obviously refers to physical units, namely, the number of freight cars in the national car fleet.

Car service rules are related to freight car utilization and distribution, and not freight car supply. During Congres-

sional hearings referred to in the Government brief (p. 7), Commissioner Tuggle clearly defined the purpose of car service regulations:

> There are three distinct aspects of the freight car problem: (1) Reasonable compensation for the use of freight cars (basic per diem); (2) incentive charges designed to encourage the building of more cars; and (3) *car service regulation directed at the equitable distribution and most efficient utilization of available cars.*[6] (Emphasis supplied.)

In its interim report (323 I.C.C. 48,60) the Commission recognized that car service orders do not add cars to the freight car fleet, and there is nothing in the report or record here to show that mandatory Car Service Rules 1 and 2 will add a single car to the existing fleet. Significantly, the Hearing Examiner found there was no persuasive evidence of record that mandatory prescription of Car Service Rules 1 and 2 "would produce improvements in car supply or utilization." (Ex. Rep., p. 42, App. .) Notwithstanding this finding by the Examiner and without citation of any support in the record, the Commission said that "[t]he continuing relocation of cars on owner's lines is of major importance to the maintenance of an adequate car supply." (J.S. App. 63.) The Commission apparently considered that location of cars off the owner's lines created the national car shortage it found to exist. (Government Brief, p. 24.) But the record shows differently. Bureau Witness Robinson said that "[d]islocation of box cars to the point where the vast majority are off owner's line is not, of course, a cause of national car shortages, but rather a result of such conditions." (VS-3, p. 110; App. .) Conceding that there was no statistically demonstrable relationship between the percentage of home cars on line and the adequacy of car ownership or a car shortage (Tr. 2070-71, 2075-76,

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[6] Hearings before the Subcommittee on Surface Transportation of the Committee on Commerce, U. S. Senate, 91st Cong., 1st Sess., June 24-25, 1969, p. 107.

2361-63, 2366-67; App.), the witness concluded that the percentages of home cars on line were not relevant to the adequacy either of the entire freight car fleet or that of an individual railroad. (Tr. 2303-04; App. .) There is no evidence of record to the contrary.

Of significance to the Commission's purported purpose of forcing the purchase of new cars is the testimony of ICC Chairman Stafford in recent Congressional hearings, referred to in the Government Brief (p. 8), that the Commission has "no statutory authority to require the purchase of new cars or the rebuilding of old ones."[7] Here, however, the Commission's order is predicated entirely upon its assumption that by making Car Service Rules 1 and 2 mandatory the Commission will force unidentified railroads to purchase new freight cars. (J.S. App. 65-66; Government Brief, pp. 14, 17, 28.)

The Government gains little by the references in its brief to the Esch Car Service Act of 1917 (pp. 19-24) and subsequent Congressional hearings (pp. 7-8). The legislative history of the Esch Car Service Act reveals that it had nothing to do with car "supply" as that term is used by the Government and dealt only with car movement and distribution. The later Congressional hearings referred to were in connection with legislative proposals for the establishment of "incentive" or "penalty" per diem charges and did not deal with the Commission's authority to establish reasonable car service rules.

B. *Imposing Mandatory Observance Of Car Service Rules 1 And 2 Will Be Unreasonably Injurious And Detrimental To Railroads And Shippers.*

Carefully reviewing the evidence of record (Ex. Rep. pp. 25-27, 42-45; App. ——), the Examiner concluded that

[7] Mimeographed statement dated June 16, 1971, in Hearings Before the Senate Subcommittee On Freight Car Shortages of the Senate Committee on Commerce on S. 1415, S. 1729, S. 1730 and S. 1731, 92d Cong., 1st Sess., p. 3.

"the weight of the evidence, and arguments based thereon, compel the conclusion that mandatory rules would be of substantial detriment to rail carriers and shippers" and would "produce numerous effects harmful to the carriers and the shipping public." (Ex. Rep. pp. 27, 42; App. ——.)

The Government argues in its brief (p. 31) that "the Commission's report answers and refutes each of the Examiner's critical conclusions." It would be more correct to say that the Commission, without citation of any evidence of record, disposed of the Examiner's conclusions by vague and general statements in its report. Note, for instance, the Commission's unconsoling statement that "[w]e are also mindful of the dangers involved in placing restrictions on the use of cars which may hamper the rail lines in providing the type and number of cars required by their individual shippers and which could lead to a loss of traffic to competing modes." (J.S. App. 63) And in the same tenor, the statements that "empty car miles will be reduced in the long run if cars are used in accordance with the rules" and "[w]hile observance of the rules may require some extra switching and short delays, this small inconvenience and perhaps additional expense is a small price to pay for the overall benefits to be derived." (J.S. App. 67)

This record does not establish what benefits would be derived from mandatory car service rules, but it clearly shows the detrimental and harmful effects. The court below had no problem in recognizing those harmful effects. (J.S. App. 21-22.) The evasive language used by the Commission, such as—"may hamper the rail lines"; "which could lead to a loss of traffic"; "will be reduced in the long run"; "may require some extra switching"; "perhaps additional expense"; "small inconvenience"; "small price to pay"—clearly shows how the Commission tip-toed around the Examiner's careful consideration of the evidence and his unqualified finding of detrimental and harmful effect upon the railroads and their shippers.

The Commission points to no contrary evidence and its report manifests an absence of any meaningful consideration of the record and of the Examiner's report. The court below found it impossible to reconcile the Examiner's detailed consideration and conclusion with the generalities indulged in by the Commission. (J.S. App. 21-23) This finding of the court below is further evidence of its compliance with the principles of judicial review contained in *Universal Camera Corp.* v. *N.L.R.B., supra.* In this respect, it is to be contrasted with the utter silence on this point of the court in *Florida East Coast Ry.* v. *United States, supra.*

Even the most superficial examination of the evidence shows the injury that would be inflicted on the affected railroads and their shippers is no "small inconvenience" or "small price to pay." The evidence by railroads and shippers in this respect is overwhelmingly to the contrary.[8] In its zeal to find support on this point the Government quotes from the Commission's report a passage dealing with assigned cars. (Government Brief, pp. 31-32.) We fail to grasp its relevance to the Examiner's finding that mandatory imposition of Car Service Rules 1 and 2 will be detrimental to railroads and shippers, particularly when Car Service Rules 1 and 2 do not apply to assigned cars. See Rule 16(D). (J.S. App. 165).

To further argue harm and injury to railroads and shippers should be unnecessary since the Commission's avowed expectation is that such harm and injury will pressure ship-

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[8] RVS-2, pp. 1-2; RVS-3, p. 3; RVS-12, p. 1; RVS-14, pp. 2-6, 8, 13-14; RVS-24, pp. 20, 59-61; RVS-27, pp. 19-20; RVS-30, pp. 5-6; RVS-32, pp. 40-41; RVS-36, p. 4; RVS-38, pp. 1-2; RVS-40, pp. 3-4; RVS-41, pp. 4-10, 12-13; RVS-43, pp. 2-5; RVS-46, pp. 9-16, 21-24; RVS-58, pp. 7-8, 12-15, 19-20; RVS-67, pp. 2, 4-6; RVS-69, pp. 3, 5-9; RVS-70, pp. 4-7; RVS-72, pp. 2-3; RVS-74, pp. 6-7; RVS-76, pp. 3-4, 6-9; RVS-77, pp. 4-5; RVS-83, pp. 2-3, 5-9; RVS-85, pp. 3-4, 6; RVS-86, pp. 5, 14-16, 22-24, 26-27. (App.____).

pers to in turn pressure railroads to buy more freight cars. The Commission says that such harm and injury will be outweighed by benefits, but nowhere does it identify or measure those assumed benefits. Instead, it relies solely on its expertise and discretion to override the undisputed evidence of record and make meaningless 50 days of hearing.

C. *Full Compliance With The Commission's Order Is Not Possible And Its Exception Provisions Do Not Afford Adequate Relief.*

No rule or regulation should be given the status of law when it is impossible for the railroads to comply with it even after a good-faith attempt to do so.[9] The Bureau anticipated that all major railroads would be in continuing violation of Car Service Rules 1 and 2. (Tr. 1557-58; App. ____.) No attempt would be made to prosecute violations deemed to be efficient or desirable, as they would be reviewed by a "friendly policeman." (Tr. 1559; App. ____.) The Bureau was not sure what penalties would apply for violations, but thought they would range from $100 to $500 for each violation. (Tr. 1561; App. ____.) Such penalties were considered to be only a "license fee" which could be collected from any railroad at any time the Bureau desired to prosecute. (Tr. 1561-62; App. ____.)

The Government does not deny that innumerable violations will inevitably occur. Instead, it argues that a violation would not result in criminal penalties in the absence of a showing of criminal intent. In other words, the railroad respondents should not object to being subject to such penalties, because when brought into court for a violation, they will then have an opportunity to defend against alleged criminal intent.

The Examiner noted the general agreement of all parties of record that complete compliance with Car Service Rules 1 and 2 is impossible, and referred to the Bureau's proposal

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[9] Tr. 254, 256, 1281, 3196; App

that the rules would be administered with "strictly controlled flexibility." He concluded that such proposal might beguile the imagination but did not provide a comprehensible standard of enforcement. (Ex. Rep. p. 24; App. ——.) A witness for the Commission Bureau that would be charged with the administration and enforcement of such rules testified that in his opinion 80 percent compliance would be good, and would be acceptable. (Tr. 1562-65, 1570-73; App. ——.) Even this level of compliance involves a violation rate so high, based on 1964 statistics, that the total amount of possible penalties would be staggering.[10] In considering the reasonableness of mandatory Car Service Rules 1 and 2, the court below found absent an "ascertainable standard of guilt," citing *United States* v. *Cohen Grocery Co.*, 255 U.S. 81, 89-91 (1921). The court was concerned about, but did not rule upon, possible constitutional questions on this point. (J.S. App. 25.)

The exception provisions are found in Note (B) to Rules 1 and 2 and in Rule 19. (Government Brief, pp. 33-34.) Witness Baumgartner, General Superintendent of Transportation for the Santa Fe Railroad, and former Chairman of the Association's Committee on Car Service, explained that the "inequities" referred to in Note B dealt with such matters as a railroad being required to haul empty cars excessively long distances compared to the loaded haul. (RVS-46, p. 13; App. ——). As he pointed out, Note B, in practice, never dealt with the unpredictable and almost instantaneous needs to deviate from Car Service Rules 1 and 2. With Car Service Rules 1 and 2 prescribed for mandatory observance, advance concurrence of the Car Service Division would have to be obtained under Note B, or ad-

[10] Based upon average weekly loadings in 1964 of 194,318 boxcars a non-compliance ratio of 20% would have meant approximately 39,000 violations a week with respect to boxcars only. Other thousands of violations would have occurred involving gondola cars, hopper cars, and flat cars. (VS-2, Exh. 7).

vance approval of the Commission under Rule 19. In the absence of such advance approval, the loading and movement of a car other than in compliance with Rules 1 and 2 seemingly would constitute violation of the Commission's order.

The Government argues that the Association urged the Commission to adopt an exception provision similar to Rule 19, and quotes from a statement made in the Association's Petition for Reconsideration filed with the Commission (Government Brief, pp. 34-35.) We do not deny that the Association requested the establishment of an exception provision. We did so for two reasons: it appeared at that time that the Commission was determined to prescribe mandatory car service rules in this proceeding and we knew from experience that full compliance with mandatory car service rules was impossible. The Government failed to mention what the Association had to say on page 92 of its Petition for Reconsideration with regard to such proposal:

> This is not to suggest that the railroads invite the imposition of mandatory car service rules or the suggested exception arrangement as an improvement over present conditions. Quite to the contrary—it is our view that even the foregoing exception proposal would be cumbersome, burdensome, and expensive, and of unproven benefit to the railroad industry and to the shippers as a whole. However, such a procedure, cumbersome or burdensome though it may be, is far preferable to the alternative—mandatory rules which are impossible to fully comply with and no provision for exceptions.

The court below noted that the Commission had modified its order to permit certain exceptions to the rules (J.S. App. 16.) However, in the face of a maximum possible compliance of 80 percent, it obviously considered that the exceptions were insufficient to validate the Commission's order. The court in *Florida East Coast Ry.* v. *United States*, *supra*, recognized the seriousness of this problem, but said that

these "relatively minor rough edges" on the Commission's plan should not be allowed to upset it. (J.S. App. 202.) If only "rough edges" were involved, the Association would not be concerned. With mandatory Car Service Rules 1 and 2, the railroad industry would be faced with the serious and practical problem of obtaining the necessary exceptions to continue operations. Railroads operate 24 hours a day, seven days a week. The need for deviation from the rules has no predictable pattern or regularity, but arises on a minute-to-minute, hour-to-hour and day-to-day basis. The need for expedited action at numerous places in the United States will not permit the negotiating and processing which is contemplated under the exception provisions. No procedures have been established as yet for obtaining exceptions, but the Bureau proposal contemplated a system whereby requests for exceptions would be stated in writing to the Commission and would contain a statement of the need for such exceptions and, when approved by the Commission, could then be exercised. (Tr. 1418-19, 1958-59; App. ——.) Transportation officers today frequently will agree over the telephone to make swaps of empty cars, or to handle empty cars other than in conformance with the car service rules, to meet some particular local emergency. (RVS-46, pp. 9-17; App. ——.) Mandatory car service rules will not permit such operating practices even with exception provisions. Under such circumstances, it is unrealistic to even assume that such exception provisions will afford adequate relief. The court below was clearly correct in pointing out this deficiency in the Commission's report. (J.S. App. 25.)

The purported objective of mandatory Car Service Rules 1 and 2 is to increase the nation's freight car supply by depriving shippers on low-ownership lines of freight cars, thereby causing them to pressure those railroads to buy more cars. If the Government is now arguing that because of the exception provisions there will be no real hardships visited upon the shippers located on the low-ownership lines

then, of course, there will be no pressure applied to these railroads, and the expected car building or purchase programs will never materialize. The Government can't straddle the fence and argue both ways on this: either mandatory imposition of the rules will hurt or will not hurt the railroads and shippers. The record clearly shows that mandatory Car Service Rules 1 and 2 will be harmful to all affected thereby.

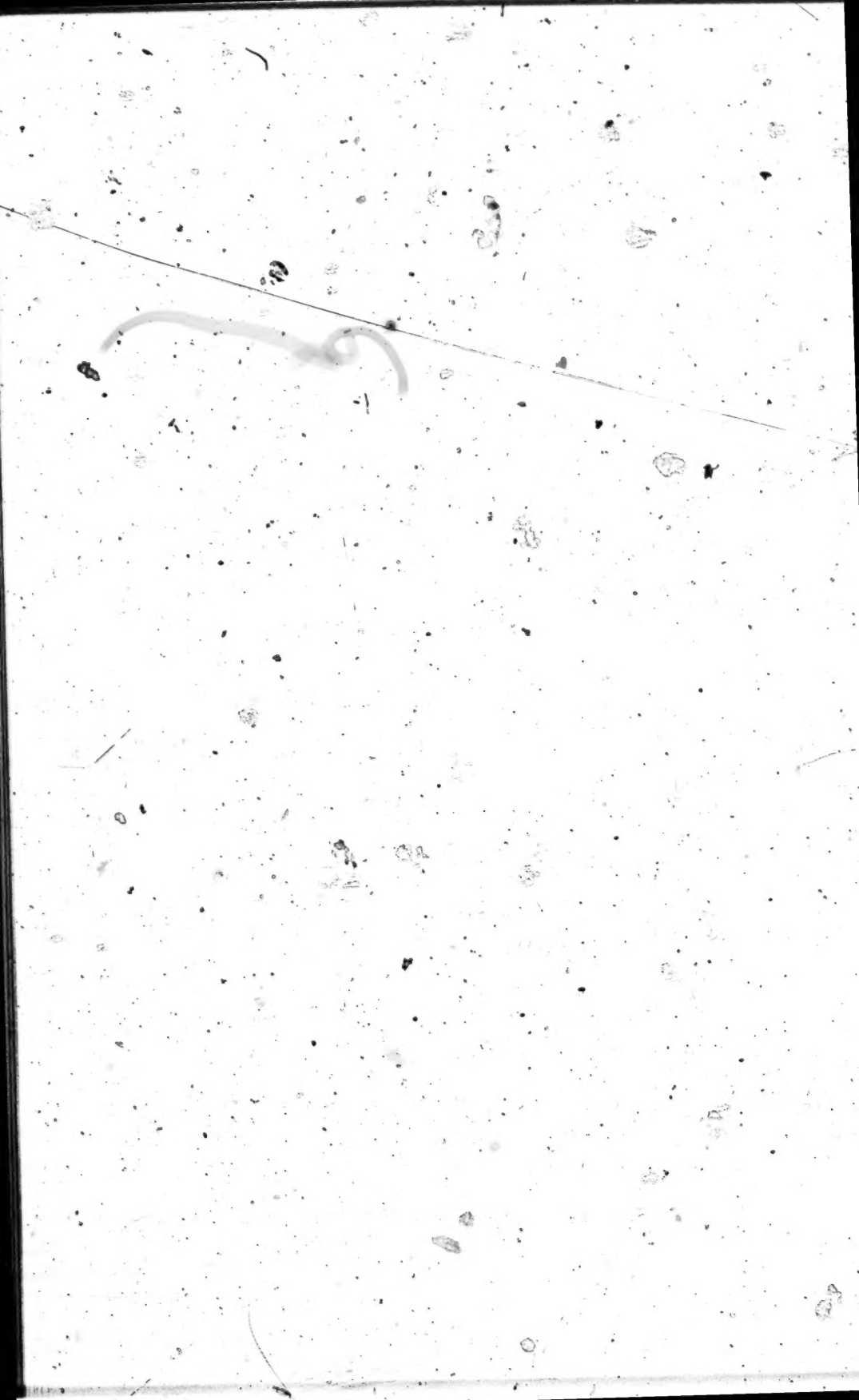
We are firmly convinced that the Commission's Rule 19 cannot adequately take care of the numerous requests for exceptions which would require immediate action.

II

The Commission's Order Lacks The Support Of Findings Essential To Its Validity.

Section 557(c) of the Administrative Procedure Act, 5 U.S.C. §557(c) (App.), provides, in part, that the Commission shall set forth in its reports "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." *Northeast Airlines, Inc.* v. *C.A.B.*, 331 F.2d 579, 586 (1st Cir., 1964). This Court, in *Burlington Truck Lines* v. *United States, supra,* at 167-68, summarized the duty of the Commission in such respects. Even prior to the Administrative Procedure Act this Court had held that the Commission not only must provide a sufficiently complete statement and explanation of its action, but also that the basic or essential findings which serve as a foundation for the Commission's conclusion must be apparent in its report. In the absence of such findings the court is "not called upon to examine the evidence" or "to make findings for the Commission." *Florida* v. *United States,* 282 U.S. 194, 215 (1931).

The first requirement then is that the Commission's report must contain essential and adequate findings to serve as an appropriate premise for the powers which it seeks to exercise under the Interstate Commerce Act. *Secretary of*



Agriculture v. *United States*, 347 U.S. 645, 654 (1954). The Commission's order must be upheld, if at all, "on the same basis articulated in the order by the agency itself." *Burlington Truck Lines, supra*, at 169; *American Trucking Ass'n.* v. *United States*, 364 U.S. 1, 13-14 (1960).

A. *The Commission Failed To Make Essential Findings With Respect To Car Shortages Or Car Needs On Owners' Lines.*

The court below was properly concerned with the absence of such findings, pointing to the decision in *Palmer* v. *United States*, 75 F. Supp. 63 (D. D.C. 1947). The absence of such findings there was held fatal to a Commission order designed to compel the return of freight cars to the owning road. In its brief (p. 29) the Government attempts to distinguish the *Palmer* case, but its attempt must fail.

The holding in the *Palmer* case was twofold:

> It follows from all the foregoing that the order of the Commission involved in this action must be set aside, because it is beyond the statutory power of the Commission, *and also because, even if the statutory power existed, this order is not supported by the requisite findings of fact.* (Emphasis supplied.) (*id.* at 76.)

Contrary to the Government's assertion (p. 29, fn. 24), the action of Congress in 1966 in no way overruled the holding in the *Palmer* case with respect to requisite findings.

Having in mind that the purpose of the Commission's order here, as it was in the *Palmer* case, is to require the return of freight cars to the owner lines, it is appropriate to call attention to the nature of those findings so fatally absent in both cases:

> But, even if the Commission had the power it claims, the findings in its report are insufficient to support its order. We have examined the report with care, in an effort to find the obviously requisite determinations. There is no finding that the public interest in the return of cars to the owning railroads outweighs the

> public interest in the prompt movement of freight awaiting shipment at the initial unloading point of the car.
>
> • • •
>
> There is no finding that in times of car shortage the necessities of non-owning railroads are less than those of the owning railroads. There is no finding that the present need for cars is on the owning roads rather than on the hiring roads. There is no finding that the roads which serve the large crop areas are owning roads. There is no finding as to what freight needs immediate movement.
>
> • • •
>
> The opinions and suggestions of several witnesses as to the effect of increased per diem charges, are recited, but no factual data from experience appears, and no underlying fact-finding whatever upon the point; the ultimate conclusion as to that effect is wholly without factual finding in support. (*id.* at 75.)

No argument is needed to establish the essentiality of such inquiries in the case at bar, inquiries which the Commission failed to make. The Commission's failure is particularly significant in light of the admission that 100 percent of home cars could be off line and there still be no car shortage on that railroad. (Tr. 960-63: App. .)

Since its decision in the instant case the Commission has exercised its authority in fixing both basic per diem charges and "incentive" per diem charges. It even more recently has continued to exercise its emergency powers under Section 1(15) of the Act, 49 U.S.C. §1(15), with respect to the return of freight cars to the owner roads. The following comment in the *Palmer* case, under similar circumstances, is most appropriate.

> Furthermore, we are advised that since the argument in this case, and before the briefs were filed, the Commission exerted its emergency power under Section 1(15) of the statute with an operating regulation for car movement, which directly controls the removal and

> return of empty cars, and imposes penalties for non-observance. That Order appears, from a reading of the text, to be a direct action, clearly regulatory in character, upon the same problem and for the same purpose as was the vaguely hopeful, roundabout measure before us in the case at bar. (*id.* at 74)

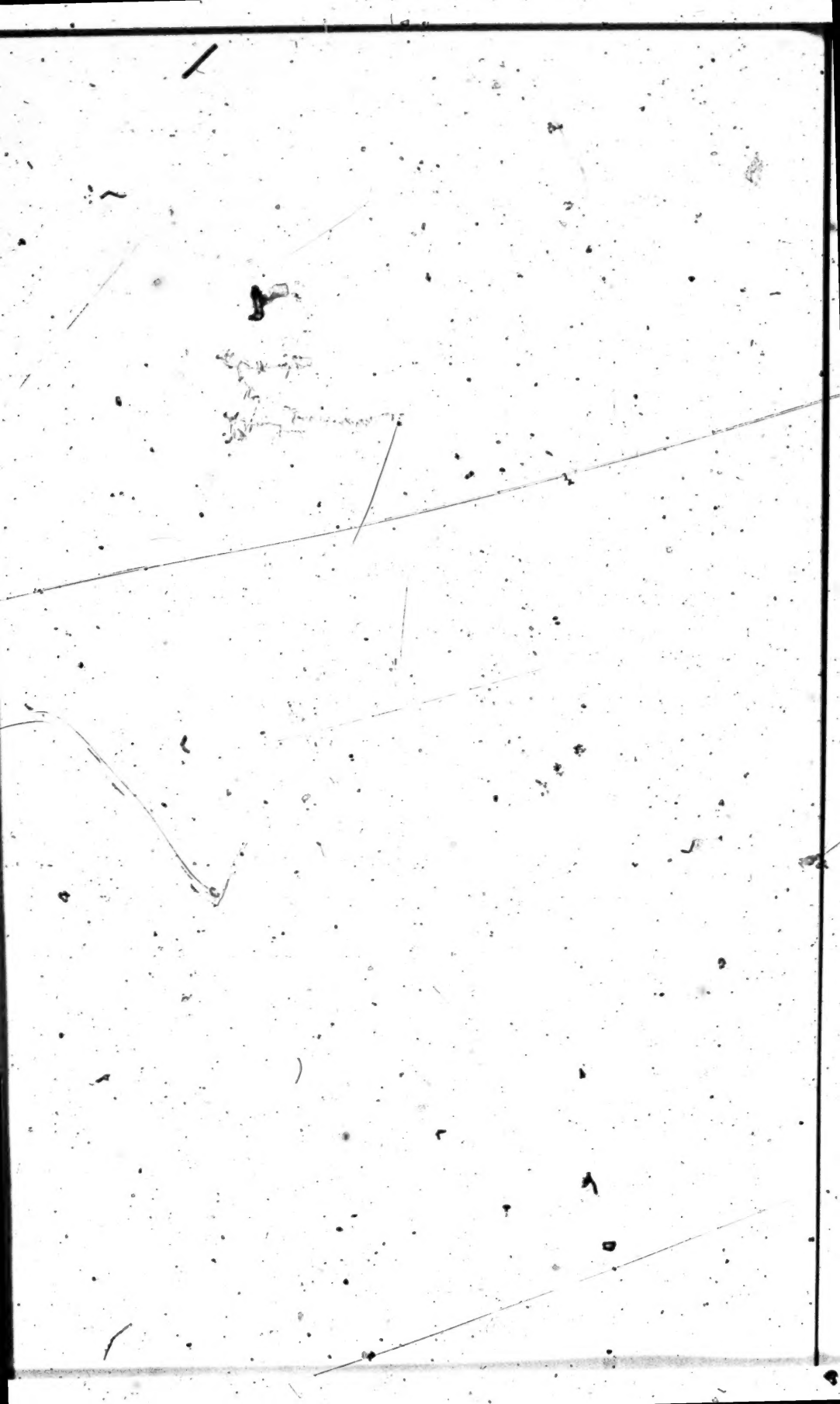
The argumentative reasoning of the Commission in this case that its prescription of Car Service Rules 1 and 2 for mandatory observance hopefully will coerce shippers on unidentified railroads to in turn coerce those railroads to buy an indeterminate number of freight cars at some indefinite time in the future, and without regard to their financial ability to do so, can only be characterized as a "vaguely hopeful, roundabout measure."

The decision in the *Palmer* case stands squarely for the proposition that even though the Commission may have full authority to issue the order in the case at bar such order is fatally defective because of the absence of essential findings.

B. *The Commission Failed To Make Adequate Findings With Respect To The Financial Effects Of Its Order Upon The Railroads And The Shipping Public.*

The court below expressed its concern about the failure of the Commission to give adequate consideration to the financial effects that mandatory Car Service Rules 1 and 2 would have upon the railroads and the shipping public. (J.S. App. 21.) It pointed to the absence of any conclusion or finding in the report as to the financial ability of the unidentified railroads, which are assumed to be deficient in car ownership, to purchase the undetermined number of additional cars which the Commission said they would be forced to buy. (J.S. App. 20-21.) Again, the Government argues in its brief (p. 30) that such findings are unnecessary.

The avowed purpose of the Commission's order is to place economic pressure upon some unknown railroads (assumed to be deficient in freight car ownership) to purchase new



freight cars. The court in *Palmer* v. *United States, supra,* at page 70, said:

> The statute does not provide that these problems be left to the chance decisions of the separate roads, each answer depending upon the road's ability to endure the financial pressure. . . .

Transportation service is not simply measured by freight car supply alone. Many other factors are involved and many types of capital expenditures. The acquisition of new freight cars must be accommodated to the other capital demands upon a railroad. The ability of any railroad to carry out a car acquisition program is governed by its ability to obtain capital funds. The railroad industry as a whole has been under a severe handicap since the conclusion of World War II because of its over-all low rate of return on investment.

The Commission cannot plead ignorance of the railroads' financial condition for its Annual Reports to Congress show this trend strikingly, and confirm beyond any question that the railroad industry has been subject to progressive financial anemia. (See annual rates of return for period 1960-1969; ICC 84th Annual Report—1970, p. 134.) The court below pointed out that the Commission was aware of the industry's financial problem in the very year of its decision, quoting from its 83rd Annual Report (1969), at page 72. (J.S. App. 21.) Despite all this, the Commission gave no consideration in its report to the financial impact that the prescription of mandatory car service rules would have upon the railroads.

C. *The Commission Failed To Make The Jurisdictional Finding That Its Prescription of Mandatory Car Service Rules 1 And 2 Was Reasonable.*

When Congress delegates a power to an administrative agency the statute delegating such authority must contain limitations or standards governing the exercise of that power. *United States* v. *Chicago, M.St.P.&P. R. Co.*, 282

U.S. 311, 324 (1931). Some of the standards which this Court has considered and held to be adequate include "just and reasonable", "public interest", and "public convenience, interest, or necessity."[11] Under the authority granted to the Commission in Section 1(14)(a), the standard is "reasonable" rules or regulations. *United States* v. *Southern R. Co.*, 250 F. Supp. 759, 761 (M.D. Ga. 1966), reversed on other grounds, 380 F.2d 49 (4th Cir. 1967).

Commission orders have been held void for lack of a finding on the essential fact conditioning its exercise of power and such quasi-jurisdictional finding cannot be left to assumption or inference. *Florida* v. *United States*, *supra*, at 215; *United States* v. *Baltimore & Ohio R. Co.*, 293 U.S. 454, 464 (1935). (See, also, *City of Yonkers* v. *United States*, 320 U.S. 685, 691 [1944].)

Recently, in *American Telephone and Telgraph Co.* v. *F.C.C.*, 449 F.2d 439, 447 (2d Cir. 1971), the Court of Appeals found that lack of a finding, in the precise words of the statute, that the prescribed practice would be "just, fair, and reasonable" was fatal to the order there involved. The court said it could not accept "the Commission's characterization of its finding as the semantic equivalent of that required by the statute" and that "it is settled that the absence of a basic or jurisdictional finding of the kind here involved cannot be justified on the ground that some other and different finding by inference or implication meets the statutory standard." (*id.* at 451.)

An indispensable finding which the Commission failed to make in its report or order was that such rules would be reasonable when prescribed for mandatory observance. Normally such a finding of ultimate fact is expressed in the

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[11] *Tagg Bros. & Moorhead* v. *United States*, 280 U.S. 420, 435 (1930); *New York Central Securities Corp.* v. *United States*, 287 U.S. 12, 24 (1932); *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 285 (1933).

language of the statutory standard. See, *e.g., Wichita Railroad & Light Co.* v. *PUC*, 260 U.S. 48, 59 (1922). Despite the voluminous evidence of record that imposition of mandatory Car Service Rules 1 and 2 was not reasonable, the Commission's report and order is silent on this basic jurisdictional fact.

Accordingly, the Commission's order is void for lack of a jurisdictional finding that Car Service Rules 1 and 2 when prescribed for mandatory observance are "reasonable" rules.

D. *There Are No Findings Affording A Basis Upon Which To Determine Whether The Commission's Order Comports With The National Transportation Policy.*

It is impossible to determine from the Commission's report how the prescription of Car Service Rules 1 and 2 for mandatory observance is consistent with Congressional directives contained in the National Transportation Policy. (App. .) The provisions of the National Transportation Policy are not mere window dressing without practical significance in terms of the Commission's powers and functions. *I.C.C.* v. *N.Y., N.H. & H.R. Co.* 372 U.S. 744, 761 (1963). Indeed, it is "the yardstick by which the correctness of the Commission's actions will be measured." *Schaffer Transp. Co.* v. *United States*, 355 U.S. 83, 87-88 (1957). The National Transportation Policy provides that "[a]ll of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy." Thus, the powers of the Commission under Section 1(14)(a) of the Interstate Commerce Act are to be exercised with a view to carrying out the provisions of the National Transportation Policy. Among those policy provisions are: "fair and impartial regulation", the intention to "promote . . . adequate, economical, and efficient service" and to "foster sound economic conditions in transportation and among the several carriers."

The evidence of record establishes and the Examiner found that mandatory observance of Car Service Rules 1 and 2 would not improve freight car service, utilization, distribution, or supply. The court below found nothing to support a contrary conclusion. The Government admits that improvement of utilization and distribution was not intended to be achieved by the Commission's action and further admits that in times of car shortage the patterns of movements that would be required by the Commission's order are contrary to the patterns that would normally produce the most efficient utilization of available freight cars during such periods of car shortage. (pp. 10-13, *supra.*)

The evidence establishes, the Examiner found, and the court below concluded that imposing mandatory observance of Car Service Rules 1 and 2 would be unreasonably injurious and detrimental to the railroads and their shippers. Moreover, the Commission's order relies upon coercion to achieve its intended results, prefers some shippers over others, and discriminates between competing railroads themselves and between the railroad industry and its competitors in other modes of transportation. (pp. 13-16, *supra*; pp. 34-35, *infra*)

The Commission was fully aware of the poor financial condition of the railroad industry generally, yet failed to consider the financial impact of its action upon the railroads. (pp. 23-24, *supra.*)

The action of the Commission is clearly contrary to the provisions of the National Transportation Policy and its report contains no indication of any consideration by the Commission of the provisions of that Policy. The Commission has offered no explanation as to how its action could possibly be in keeping with those provisions. While specific reference by the Commission to the National Transportation Policy is unnecessary, if its report and findings—

> . . . do not provide [the] Court with a basis for determining whether the Commission's decision comports

> with the National Transportation Policy, that decision must be set aside . . . (*Schaffer Transp. Co., supra,* at 92.)

See, also, *Roadway Express, Inc.* v. *United States*, 213 F. Supp. 868, 877-78 (1963), affirmed *per curiam*, 375 U.S. 12 (1963).

Failure of the Commission to provide a basis by which to determine whether its action comports with the National Transportation Policy is given added significance by the recognition of the court below that shippers and the railroads are united in opposing the mandatory rules. (J.S. App. 22, fn. 6.)

III

The Commission's Order Lacks Support By Substantial Evidence Of The Whole Record And Is Arbitrary And Capricious.

In Ex Parte 252—*Incentive Per Diem Charges*, 332 I.C.C. 11, 14 (1967), the Commission recognized that "Section 1(14) (a) differs from section 1(15) by making applicable all the requirements of due process provided by the Administrative Procedure Act, 5 U.S.C. §551, *et seq.*" Section 556(d) of the Administrative Procedure Act, 5 U.S.C. §556(d) (App.), provides that the proponent of a rule or order has the burden of proof and that the rule may not be issued "except upon consideration of the whole record . . . and supported by and in accordance with the reliable, probative and substantial evidence." That burden of proof has not been met by the proponent of mandatory car service rules and the Commission's order is not supported by reliable, probative and substantial evidence of the whole record.

A. *The Commission Failed To Accord Proper Weight To The Report And Findings Of The Hearing Examiner.*

Consideration of the "whole record" required the court below to carefully evaluate the findings and conclusions of

the Hearing Examiner "who has observed the witnesses and lived with the case." The Examiner commented on the inability of Bureau witnesses to stand cross-examination on the impact of mandatory rules. (Ex.Rep., p. 23; App. .) His findings and conclusions, being in conflict with the Commission's ultimate findings and conclusion, could render any "evidence supporting [the] conclusion . . . less substantial." *Universal Camera Corp., supra,* at 496.

As the court below pointed out (J.S. App. 22, fn. 6), the concept of mandatory rules originated in and was advocated solely by the Commission's Bureau of Enforcement. The Commission's report, and in turn its order, are predicated almost entirely upon the evidence submitted by Bureau Witnesses Kline and Robinson.

All the tables set forth in the Commission's report are taken from Witness Kline's statement (VS-2, Exh. 1-6). The testimony and exhibits sponsored by Witness Kline were thoroughly discredited in reply statements (RVS-23; RVS-47) and during cross-examination. Recognizing that many factors, in addition to the numbers of railroad owned cars, were relevant and essential to a determination of the adequacy of the national freight car fleet, the witness stated that such factors had not been considered.[12] He was the first to concede that the car shortage data was statistically unreliable.[13] He even conceded that such data did not show inadequacy in the carrier fleet. (Tr. 132; App. .) Witnesses Reider and Robinson were of the view that there was nothing in the record which would enable anyone to determine whether the ownership of any particular carrier was inadequate. (Tr. 1683-85, 2362-63; App. .) In fact, both Witnesses Reider and Kline admitted that at the time of the hearing there was no substantial freight car shortage. (Tr. 1230, 1402, 1528; App. .)

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[12] Tr. 108, 143-44, 196-98, 211, 221, 239, 247-48, 302, 342-43, 348-50; App.

[13] Tr. 27, 30, 32-33, 37, 54-55, 143, 180, 237, 249; App.

In *Incentive Per Diem Charges, supra*, at 17-18, the Commission characterized similar, and in most instances identical, evidence as being entitled to little weight and insufficient to support any valid conclusions. In a later report in that same proceeding (337 I.C.C. 183) the Commission described the lack of evidentiary worth in the statistical information of record in the case here at bar saying:

> At the time we issued the prior report, the only information which was available to us directly bearing on the adequacy of the national car supply was contained in the so-called CS-44 reports of member railroads to the Association of American Railroads and a 1-month study made by the railroads in connection with the proceedings in Ex Parte No. 241. . . . The railroads expressed reservations and criticisms of these data, leading us to find in the prior report that the data in those reports could be given little weight.
>
> We, therefore, recognized in our prior report a need for data systematically collected on scientific bases which would show the demand for railroad freight cars, the supply of cars on hand to meet such demand, and the manner and extent to which the demand was met. We then saw, for example, only an unsatisfied demand for cars without any indication of the extent to which surplus cars could be used to meet the unsatisfied demand. We expressed our concern with the paucity of data then before us and stated that, "An overall, nationwide review of traffic and service demands and trends must precede any valid determination of the existing or prospective national requirements for freight cars of particular types." (337 I.C.C. at 184-85)

In view of the Commission's own characterization of the statistical evidence in this proceeding, how could it fault and overrule the Examiner for arriving at a like conclusion? The Commission attempts to explain this remarkable shift of gears by saying that in each instance it was riding in a different vehicle. (J.S. App. 86-87). Such explanation ignores the fact that in this and the other pro-

ceeding the Commission was exercising powers conferred upon it by a single section of the Interstate Commerce Act, namely, Section 1(14)(a). Further, such explanation ignores the fact that in this proceeding the Bureau's staff agreed that the information relied upon was of little, if any, probative value.[14] The admissibility and weight of the data were also questioned by the railroad respondents.[15] The reasons for the dubious value are many, but the primary reason is that they overstate demands during peak periods. (Tr. 27, 37, 257, 295-96; App. .) Witness Kline believed that they were "grossly misleading." (Tr. 1254; App. .) He admitted his failure to consider reported car surpluses with regard to adequacy (Tr. 60, 100-02, 1228; App.), and that the use of a 24-hour yardstick to satisfy shippers' demands for cars was very arbitrary and unreasonable. (Tr. 1235-36; App. .)

The Examiner discussed at length the weaknesses in this evidence. Among other things, he pointed out that:

> Even if the reported shortages were not subject to the foregoing incompetencies, their use without recognition of concurrent surplusages of freight cars would be unreasonably biased. The record contains the CS-44 reports for the period from January 1, 1955 through the week of July 15, 1967. During such interval of 653 weeks there were more freight cars reported surplus than short during 526 weeks; the last week in which shortages were reported in excess of surpluses began on November 19, 1966. (Ex. Rep., p. 22; App. ,)

Indeed, a compilation based upon Appendix A to RVS-25 reveals that during the year 1964 the reported surpluses exceeded reported shortages of box cars during seven of the twelve months. Only in the months of January, February, October, November and December were reported shortages

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[14] Tr. 26-27, 179, 221, 237, 296, 1242-43, 1248-49, 1473-74; App. .

[15] Tr. 2661-63, 2694-95, 3418-19, 3569, 3833-34, 4491, 4660-61, 4667; App. .

in excess of reported surpluses. Under such circumstances there can be no "continuing" or "chronic" shortage nationwide for such a year. (Tr. 101-02,; App. .) Perhaps this explains why a later 1968 study, conducted in Ex Parte 252 (Sub-No. 1)—*Incentive Per Diem Charges—1968*, 337 I.C.C. 217, led the Commission there to conclude that the supply of general service box cars was inadequate to meet the demands for such equipment during only the six-month period September through February, and that "the individual need of particular carriers for cars in the March through August period can be remedied by service orders or car distribution directives." (*id.* at 220, 223, 226.)

In an attempt to support his proposal for mandatory car service rules, Witness Robinson submitted exhibits (VS-3, Ex. 24-28) based upon certain Commission field agents' reports. Such reports, in most cases, were not prepared in the ordinary course of business, but were prepared and collected solely for use in this proceeding. (Tr. 818, 938; App. .) These reports were then reviewed by three members of the Commission's Bureau of Operations staff, Witnesses Reider, Robinson and Kline. Only those reports showing "bad practices" were selected for use in this proceeding (Tr. 787-88; App.) and for the express purpose of strengthening the Bureau's case. (Tr. 1674-75; App. .)

The instructions for the preparation of these reports were issued by regional directors urging the field agents to produce more "good" (bad practice) reports. (Tr. 811-812; App. .) When questioned as to why no attempt was made to have an objective investigation and study made, so that the Commission might have a full view of the good as well as bad car handling practices, the reply by the Bureau's witness was simply that the Bureau had "neither the staff nor the time" to make such an objective study. (Tr. 2228; App. .)

There was no pretense or indication that the analysis, the so-called "studies", or the field agents' reports were made in conformity with any scientific sampling techniques or procedures. (Tr. 1662-63, 2179-80; App. .) The Examiner, in considering the same evidence and its method of selection, concluded:

> In many instances an attempt is made to support the proposed regulation or rule by an exhibit, but in some instances no evidence is offered. The exhibits are generally based on reports from field agents who were instructed to seek evidence concerning so called bad practices to be used in support of the various proposals. To say that this method of gathering evidence does not produce a representative showing is a gross understatement. As a matter of fact, it goes beyond a statistical bias to such an extent as to be completely weighted against the respondents and in support of a proposed regulation or rule. Or as one witness stated the bad practices only were shown because it was assumed that respondents would present evidence relative to good practices. (Ex. Rep., p. 23; App. .)

There was no evidence submitted nor inquiry made by the Commission with respect to many factors conceded to be necessary to any determination of the adequacy of the freight car fleet and the efficiency of the utilization of that fleet. (See footnote 12, *supra*, p. 29) The Examiner recognized the essential nature of those missing factors:

> In connection with the adequacy of freight car ownership it should be noted in passing that the record contains no quantitative information as to the available substitution of cars, nor facts such as those normally developed through market research. Such data, as stated by the Commission in . . . *Incentive Per Diem Charges, supra*, are essential to conclusions regarding the adequacy of the freight car fleet. (Ex. Rep., p. 17; App. .)

He concluded that:

> Upon considering all of the evidence, the hearing examiner finds that the record does not contain com-

petent evidence upon which to base a conclusion as to the adequacy of freight car ownership. (Ex. Rep., p. 63; App. .)

In the Commission's report (J.S. App. 51-52) and in the Government brief (p. 9) it is said that the Bureau concluded there was a national freight car deficiency of 111,042 cars, or 7.66 percent of the railroads' total car ownership. This is a reference to page 10, Exhibit No. 1, accompanying VS-4, offered by Witness Gunderson. This witness, however, introduced a later verified statement (VS-4, Part 2), revising his previous statement and eliminating pages 2 through 11 of his Exhibit No. 1. The witness and counsel for the Bureau stated that, in light of the revised testimony of the witness, the statistical information contained on pages 2 through 11 of his Exhibit No. 1 no longer had any relevance. (Ex. Rep. p. 17; Tr. 394-96, 1684-85; App. .)

In its report the Commission places great emphasis upon the percentage of box cars owned located on owners' rails. (J.S. App. 53-55, 63.) We earlier pointed out that the percentage of home cars on line has no necessary causal relationship to freight car shortages. We here point to the fact that all evidence of record showing percentage of home cars on owners' lines is confined to box cars only and mostly to plain box cars. Thus, there is no evidence of record as to the percentage of home cars on line of any type of freight car other than box cars. Nevertheless, the Commission's order runs against all types of freight cars.

B. *The Order Of The Commission Creates Discrimination And Inequities As Between Railroads.*

The Commission's order runs only against railroads named respondents by the Commission's order of July 29, 1964. (M.A. App. 22-28). Many common carrier railroads, which originate and terminate freight and which are subject to the jurisdiction of the Commission, are not subject to the order. Notwithstanding this fact, and the resulting discrimination against the named railroads and in favor of

the omitted railroads, the Commission's report states that it is prescribing rules "to be observed by all carriers at all times." (J.S. App. 62.) In its Jurisdictional Statement (pp. 7-8) the Government asserts that the rules at issue govern the disposition of freight cars of all the nation's railroads and that "[s]uch rules must be uniformly applied to all roads to avoid discrimination and inequities." When, however, in this Association's Motion to Affirm, the discriminatory situation referred to was pointed out, the Government backed away from the statements in the Commission's report and in the Jurisdictional Statement as to the necessity for application of the order to all railroads and said simply that the order applied "to all Class I railroads, which are those with annual operating revenues of $5,000,000 or more." (Memorandum in Opposition, pp. 4-5.) If discriminatory treatment is to be based upon size or operating revenues, certainly there should be some finding, based upon evidence of record, as to why such action is necessary and proper.

This type of conflict between a Commission report and its accompanying order, namely, a finding that the rules must "be observed by all carriers at all times" and an order running only against certain named railroads (J.S. App. 167), is similar to that involved in *Chicago, R. I. & P. Ry. Co.* v. *U.S.*, 284 U.S. 80. There the Commission's finding was with respect to all railroads but its order excepted certain railroads. This Court said:

> Plainly this order is in flat opposition to the finding and cannot be permitted to stand. (*id.* at 96.)

C. *The Commission's Order Is Predicated Upon Matters Of Which It Took Official Notice Contrary To The Requirements Of The Administrative Procedure Act And Its Own Rules Of Practice.*

It was assumed by the Association that any Commission order in this case would be based upon reliable, probative

and substantial evidence of the "whole record." In its report, however, the Commission based its action upon

> . . . the evidence adduced and official notice taken of congressional hearings, numerous complaints by shippers to the Commission, and various studies made in and outside the Commission, . . . (J.S. App. 87.)

By such official notice the deficiencies in the record were sought to be met. The Commission changed its course from a proceeding instituted to obtain "detailed and precise information' to one taking official notice of unidentified data outside the record.

The Hearing Examiner concluded "that the record does not contain competent evidence upon which to base a conclusion as to the adequacy of freight car ownership." (Ex. Rep. p. 63; App.) The Commission side-stepped the Examiner's conclusion that competent evidence was lacking of record by taking official notice of "congressional hearings, numerous complaints by shippers to the Commission, and various studies in and outside the Commission." Such action was inconsistent with its affirmance of the Examiner's ruling on other inadmissible evidence:

> . . . we agree with the examiner that the statements stricken therein are inadmissible since they are in the nature of hearsay or conclusions based mainly on material that would not lend itself to cross-examination. (J.S. App. 32.)

The Association agrees with the Commission's rejection, indeed exclusion from the evidence, of such material and statements as being "in the nature of hearsay," or because it "would not lend itself to cross-examination," or because the respondent railroads had no opportunity to rebut. Such ruling by the Commission was eminently correct, but having done so how could it then rest its action upon "official notice taken of congressional hearings, numerous complaints by shippers to the Commission, and various studies made in and outside the Commission"? The Government's

brief here makes no effort to explain such inconsistent action by the Commission, but in its brief before the court below (p. 15) it argued that the error, if any, was not prejudicial since the Commission's finding was "fully supported by the record in any event"—an argument entirely inconsistent with the Commission's stated reliance on the matters of which official notice was taken.

The Commission's action in taking official notice of such data was a violation of the Commission's General Rules of Practice regarding the submission and admission of evidence.[16] Under the Commission's own rules, it has held that "official notice" does not extend to the data, records, or studies in other hearings or proceedings.[17] An administrative agency is bound by its own procedural rules, even though the establishment thereof may have been within its sole discretion. *Pacific Molasses Co.* v. *Federal Trade Commission*, 356 F.2d 386, 389-390 (5th Cir., 1966); *Mississippi Valley Barge Line Co.* v. *United States*, 252 F.Supp. 162, 166 (E.D. Mo. 1966), appeal dismissed, 385 U.S. 32 (1966).

The Commission, in its "official notice" action also violated Section 556(e) of the Administrative Procedure Act, 5 U.S.C. §556(e) (App.), requiring the Commission, when its decision rests on official notice of a material fact not in the evidence of record, to afford affected parties "an opportunity to show to the contrary." *Glendenning* v. *Ribicoff*, 213 F.Supp. 301, 302-03 (W.D. Mo. 1962); *Sosna* v. *Celebreeze*, 234 F. Supp. 289, 290 (E.D. Pa. 1964). The Association's petition for reconsideration was denied by the Commission.

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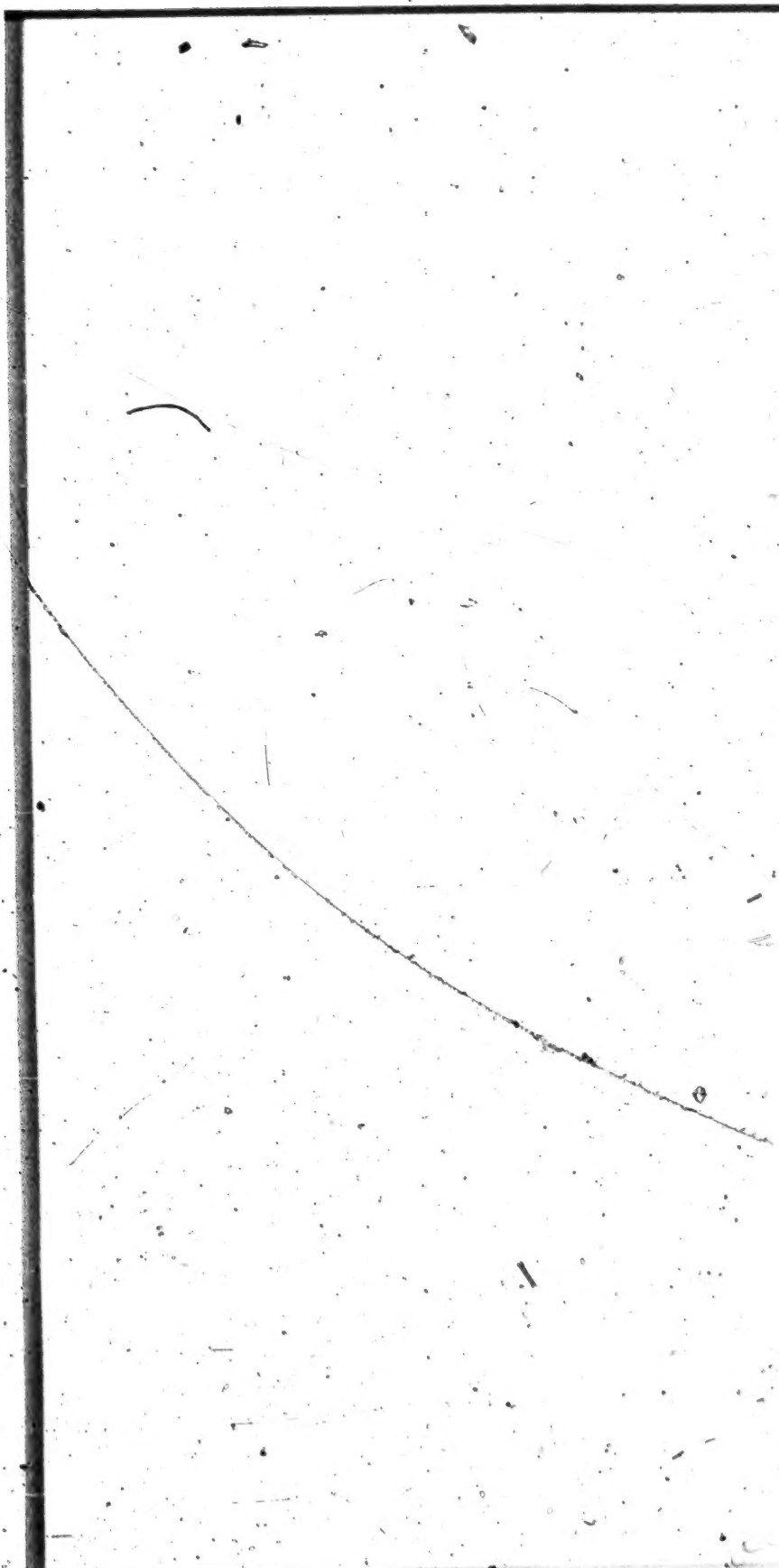
[16] Rules 75 to 87 of the Commission's General Rules of Practice, Chapter X, 49 C.F.R. Part 1100.

[17] See *St. Johnsbury Trucking Co., Inc. Extension-Heavy Hauling*, 53 M.C.C. 277, 289 (1951); *Watson Bros. Transp. Co., Inc.-Purchase-S. & C. Transport*, 70 M.C.C. 317, 318 (1956); *Blytheville Chamber of Commerce* v. *Aberdeen & R. R. Co.*, 259 I.C.C. 201. 210, fn. 4 (1944).



At oral argument before the court below Commission counsel, apparently having some doubt about the Commission's official notice action, argued that what the Commission really had in mind was various other proceedings. The Government brief in this Court, (pp. 7-8) contains the same argument. The court below apparently was unimpressed by these *post hoc* rationalizations of counsel in an effort to provide support for the Commission's official notice action. The Commission's action must be judged by what is contained in its report and not upon after supplied reasons and rationalizations of counsel. *N.L.R.B.* v. *Metropolitan Life Ins. Co.*, 380 U.S. 438, 443-444 (1965). The Commission's consideration and reliance upon such matters outside the record was prejudicial and reversible error. *I.C.C.* v. *Louisville & Nashville R. Co.*, 227 U.S. 88, 93-94 (1913); *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 58, 74 (1935); *United States* v. *Abilene & So. Ry Co.* 265 U.S. 274 (1924).

The Commission's use of "official notice" here is similar to that condemned by this Court in *Ohio Bell Tel. Co.* v. *Public Utilities Commission of Ohio*, 301 U.S. 292 (1937). This Court's condemnation of such action bears repeating here:

> . . . . Even so, to press the doctrine of judicial notice to the extent attempted in this case and to do that retroactively after the case had been submitted, would be to turn the doctrine into a pretext for dispensing with a trial.
>
> What was done by the Commission is subject, however, to an objection even deeper. There has been more than an expansion of the concept of notoriety beyond reasonable limits. From the standpoint of due process —the protection of the individual against arbitrary action—a deeper vice is this, that even now we do not know the particular or evidential facts of which the

Commission took judicial notice and on which it rested its conclusion. Not only are the facts unknown; there is no way to find them out.

* * *

This will never do if hearings and appeals are to be more than empty forms. (*id.* at 302-03.)

CONCLUSION

For the foregoing reasons, the judgment of the District Court below should be affirmed.

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IN THE

Supreme Court of the United States

No. 71-227

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Appellants,

v.

ALLEGHENY-LUDLUM STEEL CORP., *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR
THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE

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BRIEF FOR THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE

QUESTIONS PRESENTED

The ultimate question presented here is whether the district court was correct in enjoining and setting aside the Commission's order prescribing Car Service Rules 1 and 2 for mandatory observance by the nation's railroads. These rules require the railroads to return foreign freight cars, either loaded or empty, to the railroad owning them. The Commission's order was promulgated in an attempt to increase the number of cars owned by the railroads as a group.

This question involves other, subsidiary questions:

(1) Whether the district court correctly held that the rules were not reasonable as required by Section 1(14)(a) of the Interstate Commerce Act.

(2) Whether the district court correctly held that the Commission's order was not supported by adequate findings and substantial evidence.

SUMMARY OF ARGUMENT

I. The history of the car service rules and Section 1(14)(a) of the Interstate Commerce Act, 49 U.S.C. § 1(14)(a), shows that neither the rules nor the statute were intended to deal with problems of car supply and ownership. The Commission concluded that mandatory observance of Car Service Rules 1 and 2 will act as an incentive to increase the ownership of freight cars by the railroads. The various steps in the Commission's analysis are not properly related to adequate findings nor are they supported by substantial evidence. Other methods are available to accomplish the Commission's objectives.

The Commission was required to make specific findings as to car shortages on individual railroads and of their financial capacity to acquire more equipment. In the absence of such findings, there is no basis for believing the Commission's action will achieve its objective of increasing car supply. If the *raison d'etre* of the Commission's regulatory scheme is frustrated, the mandatory observance of the rules is not reasonable.

The Commission also failed to make proper and adequate findings from the substantial evidence of record that mandatory observance of the rules would have an adverse financial impact on the shipping public. The opposition to these rules from the primary beneficiaries of any increase in car supply is indeed significant.

The Commission's summary reversal without careful analysis of the examiner's recommended report and order

was improper. The examiner carefully reviewed and analyzed the evidence of record and concluded that the prescription of the rules for mandatory observance was not reasonable. The Commission failed to properly explain its reversal of the examiner.

II. The Commission also failed to develop a comprehensible standard of enforcement of the rules. The rules would expose persons subject to them to criminal liability when total compliance is neither expected nor possible. Aware of this problem, the Commission established exceptions procedures as an afterthought which were unsupported by substantial evidence or reasoned findings. Similar procedures had previously been rejected by the examiner as dilatory and inflexible.

ARGUMENT

I.

THE DISTRICT COURT CORRECTLY FOUND THAT MANDATORY OBSERVANCE OF CAR SERVICE RULES 1 AND 2 WAS NOT REASONABLE AND THE COMMISSION HAD FAILED TO MAKE CERTAIN NECESSARY FINDINGS.

A. The Code of Car Service Rules and The Esch Car Service Act Were Developed To Deal With Car Distribution.

The Interstate Commerce Commission prescribed the car service rules at issue in the belief that this action would increase the aggregate number of cars owned by the railroads and available to shippers.[1] The Commission and the appellants believe that this action will only incidentally improve

---

[1]As used in the remainder of this brief, car supply is defined as the aggregate number of cars owned by all railroads and available for use by shippers. Car distribution is defined as the location of cars at proper time and place when the need for them arises. Of course, both are essential to meet the needs of commerce but the distinction should be kept in mind.

the distribution of the existing car fleet (J.S. App. 65, Br. 17, 24). One principal error of the Commission, which the district court grasped, is its persistence in the erroneous belief that both the statute it is relying on, and the car service rules prescribed under its authority, will serve to improve car *supply* when they were only ever intended to improve car *distribution*.

A careful reading of the Commission's decision in *Car Supply Investigation*, 42 I.C.C. 657 (1917), shows that, in spite of its name, the problem confronting the Commission at that time was distribution, and not supply, of cars in the emergency situations created by World War I. Parts of the nation, such as the Northeast and the Atlantic seaboard, had an over abundance of cars, while other parts, such as the Middle and Far West, were suffering from a great deficiency (42 I.C.C. at 661). The cause was not inadequate ownership by the railroads of sufficient cars, either in the aggregate or individually, but ". . . unprecedented traffic, lack of adequate yard, trackage, warehouse and elevator facilities, insufficient motive power . . ." and many other causes, some beyond the railroads' control (42 I.C.C. at 668).

It is clear that the car service rules developed by the railroads and then prescribed by the Commission were intended to deal with an overwhelming problem of car distribution and not supply. Later, as the Government's brief points out (Br. 20-21), the Commission asked Congress to remove any doubts as to its statutory authority to prescribe such rules in order to deal with the distribution problem. See also Interstate Commerce Commission, *31st Annual Report*, pp. 61-68 (1917). Congress responded by enacting the Esch Car Service Act of 1917.[2] There is no indication in any of the

[2] 40 Stat. 101. The 1917 Act enacted only the first sentence of the present Section 1(14)(a). The remainder of the Section was added by Pub. L. 89-430, 80 Stat. 168 (1966). This was done at the request of the Commission (See *78th Annual Report*, pp. 63-64 (1964) and *79th Annual Report*, pp. 92, 116-117 (1965)), to enable it to prescribe incentive per diem charges for car hire. While this part of the statute was enacted as an attempt to deal with car supply

legislative history relied on by the appellants that the Esch Act was ever intended to deal with any problem other than car distribution, the problem then confronting Congress and the Commission.

The League and the other appellees are not here challenging the general authority of the Commission to prescribe rules, regulations and practices with respect to car service which are reasonable. What is challenged is the Commission's action in prescribing mandatory observance of Car Service Rules 1 and 2 of the AAR's Code under the authority of Section 1(14)(a) when neither the statute nor the rules were intended to deal with car supply or ownership. The Commission's action is unreasonable and beyond the scope of Section 1(14)(a) as enacted in 1917.

B. The Commission's Conclusion That Car Service Rules 1 And 2 Will Increase Car Ownership Was Without A Rational Basis And Was Unsupported By Substantial Evidence.

The contention by the appellants that there is a rational basis for the Commission's belief that mandatory observance of Car Service Rules 1 and 2 will compel the railroads to acquire more freight cars is without merit. The Commission's five-step logical exercise is conclusory and assumes the truth of the very proposition it purports to justify. And, in addition, the various steps in the progression are not supported by adequate findings or substantial evidence.

First of all, for example, contrary to the appellants' assertion that car shortages are caused by the low percentage of cars on their owners' lines, the Commission's own witness testified:

(Ibid.), the fact remains that the original part of Section 1(14)(a), unchanged in 1966, was designed for an entirely different problem. The language added in 1966 relates only to that part of the original section which dealt with the compensation to be paid for car hire. See H. Rep. 1183, 89th Cong. 2nd Sess. (1966).

> "Dislocation of box cars to the point where the vast majority are off owners' lines is not, of course, a cause of national car shortages, but rather a result of such conditions." (V.S. 3, p. 110; App. 175)

The witness then went on to state that this situation creates severe car distribution problems as various railroads try to meet the needs of on-line shippers.

At another stage in its analysis the Commission asserts that because of the low percentage of owned cars on line, there is little incentive for the railroads to purchase cars when the beneficiaries are other lines (J.S. App. 55). This assertion in turn is based solely on a conclusory statement of only one witness, totally unsupported by any substantial evidence (V.S. 3, p. 111; App. 176-177). With respect to any and all other evidence presented which might support the mandatory observance of the rules, the examiner, who had the opportunity to review the evidence in detail and who conducted the hearings at which the witnesses were cross-examined, stated his views on the validity of such evidence and the competence of the witnesses as follows:

> "In many instances an attempt is made to support the proposed regulation or rule by an exhibit but in some instances no evidence is offered. The exhibits are generally based on reports from field agents who were instructed to seek evidence concerning so called bad practices to be used in support of the various proposals. To say that this method of gathering evidence does not produce a representative showing is a gross understatement. As a matter of fact it goes beyond a statistical bias to such an extent as to be completely weighted against the respondents and in support of a proposed regulation or rule. Or as one witness stated, the bad practices only were shown because it was assumed that respondents would present evidence relative to good practices.
>
> The proposed regulations and rules were composed with a principal aim in mind, the most expeditions [sic] return of freight cars to owners whether they

> want them or not. These rules necessarily affect relations between and among rail carriers and their shippers, or with carriers using competitive modes of transportation. These relations would embrace one or more of the following subjects: per diem, economics, marketing, traffic, statistics, finance, accounting, export or import trades, and law. The witnesses for the Bureau of Operations claim no expertise or education in such fields of knowledge, and did not ask qualified personnel in the Commission to evaluate their proposals in order to discover whether they would produce sound or lawful results. Despite the inability of the witnesses to stand cross-examination concerning the impact of the proposed regulations and rules on the respondents or shippers in relation to the foregoing subjects, the Bureau of Enforcement on brief urges that such proposals be made manditory [sic] by the Commission." (H.Ex. 23; App. 28-29)

The Commission could find no support for its belief that Car Service Rules 1 and 2 will improve the supply, as distinct from the distribution, of cars. For example, the appellants point out that a witness on behalf of the League agreed on cross-examination that the car service rules would improve car distribution between various regions of the country (Brief, p. 11; Tr. 5603-5604; App. 149-150). But this certainly cannot be characterized as support for the idea that the rules will do anything to improve car ownership.

As indicated in the appellants' brief, the Commission has acted in other proceedings to encourage the prompt return of cars to their owners.[3] The need for using the car service rules to accomplish the same objective, but with the unnecessary additional creation of confusion, delay and inflexibility has not been shown by the Commission.

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[3] *Incentive Per Diem Charges–1968*, 337 I.C.C. 183 and 217, sustained on review *sub nom. Long Island R. Co. v. United States*, 318 F.Supp. 490 (E.D. N.Y.), and reversed and remanded in *Florida East Coast Ry. Co. v. United States*, 322 F.Supp. 725 (M.D. Fla.), appeal pending in this Court, No. 70-279.

The Commission also prescribed in this proceeding a so-called car-ownership formula based on the so-called interline car-day formula. The stated purpose of this formula is to develop information as to the adequacy of the ownership of all the various types of cars by each railroad supplying information. Then each individual railroad will be able to determine with more certainty its needs for acquisition of particular types of cars (J.S. App. 81-87).[4] Given the existence of the car-ownership formula, whose prescription is unchallenged here,[5] the imposition of Car Service Rules 1 and 2 on the railroads, with its attendant extra expense and delay for both carriers and shippers is unnecessary. The same information as to ownership needs can be developed from the data supplied by the application of the formula without the need for using car service rules in an inflexible and dilatory manner.

Perhaps realizing the substantial deficiencies in the record evidence in support of the mandatory observance of the car service rules, the appellants have gone outside the record to Congressional materials to try and shore up their case. But the significance of this material is doubtful. Some, if not all, of it appears to be directed to problems of car distribution, as shown by the testimony of a witness for the Kansas City Board of Trade quoted by the appellants (Brief, page 26).

The Commission did not have any rational basis nor any substantial evidence in the record to support its conclusion that mandatory observance of Car Service Rules 1 and 2 would provide an incentive for new acquisitions of cars.

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[4] It is significant that the Commission admits in its report that it is unable to make any findings on this record as to shortages of freight cars on any single railroad (J.S. App. 84). See *infra* pp. 9-11.

[5] It was challenged in *Florida East Coast Ry. Co. v. United States*, 327 F.Supp. 1076 (M.D. Fla., 1971), but the court held that judicial review of the formula was premature (J.S. App. 196-197).

C. The District Court Correctly Held That It Was Necessary For The Commission To Make Specific Findings Of Car Shortage On Individual Railroads And Of Their Financial Capability To Acquire New Equipment.

The League has shown that the Commission's idea in Ex Parte No. 241 was to take car service rules designed to improve car distribution and prescribe them under a statute passed by Congress with the same problem in mind (*supra*, pages 3-5). But the Commission's purpose here was to increase car ownership. The Commission should certainly not be prevented from making imaginative use of the Esch Car Service Act of 1917 in an attempt to solve the car service problems of the 1970's. But in taking such initiatives, the Commission should not neglect the requirements of the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*

The whole basis for the Commission's action in prescribing Car Service Rules 1 and 2 is the proposition that *some* railroads own enough cars to meet the needs of shippers on their lines, while other railroads do not (J.S. App. 65-66). The Commission apparently hopes that if there are such car-deficient railroads, mandatory observance of the car service rules will create a better source of quantitative information about their ownership for such railroads. Beyond that, the Commission hopes its action will compel any individual railroads with a deficiency to acquire equipment sufficient to meet the needs of on-line shippers (J.S. App. 65-66).

However, as the district court correctly held, the Administrative Procedure Act requires the Commission to make a finding that some railroads were deficient in their car ownership before it decided to prescribe the rules at issue. Such a finding is necessary to support the Commission's conclusion that, apart from any other consequences, mandatory observance of the rules will incidentally improve utilization of cars "... insofar as return loading is compatible with the primary objective of increasing availability of cars to the owner." (J.S. App. 65). But if owner lines have a sufficient

number of cars on hand to meet the needs of on-line shippers, utilization will not be improved. Conversely, railroads who need the cars will be deprived of their use because they would have to send them to railroads who do not require them. Consequently, a finding by the Commission that car owning lines in fact needed their cars is essential to support a conclusion that the rules will act to improve utilization, rather than aggravating an existing problem of distribution.

It should be kept in mind, however, that the Commission's primary objective was to increase car ownership, and only incidentally improve car utilization (J.S. App. 65).

The appellants believe that the passage quoted from the decision of the district court in Florida supports the proposition that a specific finding of ownership deficiencies on some railroads was not necessary.[6] Even if this is correct, the Florida court upheld the rules on a basis other than that relied on by the Commission and advanced by it here. The Florida court obviously views the rules as a means of dealing with a problem of car *distribution*. That court said that the question was whether or not cars should be distributed to their owners for their use in times of car shortage (J.S. App. 201). The Commission states here that the question is whether or not it may use the rules to compel the railroads to purchase more cars, a question the Florida court never reached (J.S. App. 200-201).

The district court also held that the Commission should have made a finding of "... the capacity of the railroad industry to absorb new freight car capital expenditures." (J.S. App. 20-21). The appellants contend such a finding is unnecessary, but, to the contrary, it is even more vital than the other specific finding the court held was necessary. If the Commission's proposal is to succeed in its objective of increasing car ownership, then some indication of the probability that the financially weak railroad industry could meet

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[6]Brief, pp. 28-29. The decision is reported at *Florida East Coast Railway Co. v. United States*, 327 F.Supp. 1076 (M.D. Fla. 1971).

the requirements is essential. If the railroads are unable to generate the resources to acquire more cars, then the car supply problem remains unsolved. But the restrictions on loading operations, delays, extra switching and additional expense dismissed by the Commission as inconsequential (J.S. App. 67) would become a burden unameliorated by the hoped-for but nonexistent benefits of a solution to the car supply problem.

In arguing that the findings required by the district court are unnecessary, the appellants are in effect saying that they do not involve a material issue of fact. The League submits that this is not the case. The existence of ownership deficiencies on certain railroads and their financial capacity to remedy them are essential pieces in the Commission's regulatory ensemble. Therefore, they are a ". . . material issue of fact . . . presented on the record." Section 8(b) of the Administrative Procedure Act, 5 U.S.C. § 557, requires the Commission to make adequate findings on such issues, and this it has not done.

D. The District Court Correctly Found The Rules Were Not Reasonable Because Of Their Adverse Financial Effects On The Shipping Public.

The Government's brief has largely ignored the district court's ruling that the rules are unreasonable because the Commission failed to properly consider the financial effects on the shipping public. Substantial and probative evidence was placed in the record by the shipper parties to the Commission proceeding. For example, a witness for the League submitted this testimony:

> "Certainly the Commission would not adopt Car Service Rules so rigid as to prevent the free flow of commerce by railroad. At the local level the carrier and shipper are in the best position to adapt themselves to car shortage conditions. Extreme differences may apply among the thousands of shipping points throughout the nation. No single rule or rules

can be expected to meet the conditions unique to the various shipping origins and destinations." (R.V.S. 76, p. 3; App. 300)

The hearing examiner, after carefully reviewing the evidence, concluded that prescription of the rules would "produce numerous effects harmful to the carriers and the shipping public." (H. Ex. 43; App. 49).

It is most significant that the shipping public, which presumably would have the most to gain from an improved car supply, is almost uniformly opposed to the mandatory observance of Car Service Rules 1 and 2. No shippers or shipper representatives intervened in support of the Commission's order, either in this case or in the Florida action (J.S. App. 13, 185). This opposition to the rules from groups whose interest are generally diametrically opposed to those of the railroads is, we submit, highly indicative of the unreasonableness of the Commission's scheme of regulation.

E. The Commission's Handling Of The Examiner's Recommended Report And Order Was Improper.

The district court noted the hearing examiner's conclusion that the imposition of mandatory car service rules "... would be of substantial detriment to rail carriers and shippers." (H. Ex. 27; App. 33).[7] The Commission's summary dismissal of the admittedly "strenuous" objections of the shippers to the proposed rules should be contrasted with the examiner's careful analysis in his report, on two separate occasions, of the proposals made, the evidence presented on them and his reasoned conclusions thereon (H. Ex. 23-27, 40-43; App. 28-33, 46-49). In concluding his specific discussion of the present Car Service Rules 1 and 2, the examiner said:

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[7]The appellants noted some other areas of disagreement between the examiner and the Commission (Br., p. 31), but these dealt with matters other than Car Service Rules 1 and 2.

> "In other words, prescription of such rules, or any other car service rules which are duplicative of the present AAR rules, has not been justified by any evidence which is persuasive that such prescriptive orders would produce improvements in car supply or utilization. On the contrary, for the reasons stated in connection with Proposal II, prescriptive orders which are issued for the sole purpose of making car service rules mandatory produce numerous effects harmful to the carriers and the shipping public." (H. Ex. 42, App. 48-49).

Even judged by the standards of *Greater Boston Television Corp. v. Federal Communications Commission,* 444 F. 2d 841 (D.C. Cir., 1971) cert. den., 402 U.S. 923, a case relied on by the appellants, the Commission's treatment of the examiner's recommended report and order is deficient. Immediately following the passage they quote, the court noted:

> "Here, the Commission accepted the Examiner's findings and conclusions to a substantial degree; and when it did not, the Commission made clear not only its awareness of what the Examiner had concluded, but also its reasons for taking a different course."

In this case, the Commission's decision is blissfully unaware of the examiner's contrary conclusions on the need for Car Service Rules 1 and 2, provided no justification from the record for reaching a different conclusion[8] and noted simply that: "Our conclusions differ in part from those recommended [by the examiner]." (J.S. App. 28-29).

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[8]Cf. *Universal Camera Corp. v. N.L.R.B.,* 340 U.S. 474, 494-95 (1951).

II. THE DISTRICT COURT PROPERLY FOUND THE RULES UNREASONABLE FOR LACK OF A COMPREHENSIBLE STANDARD OF ENFORCEMENT.

It is clear that the district court was troubled by the enforcement provisions of the Commission's proposed regulations on car service, although it perhaps did not clearly articulate the basis for its disapproval. To clarify this matter, a certain amount of background is desirable.

First of all, assuming that Car Service Rules 1 and 2 were in effect, the Commission would have several methods available to enforce them. First, Section 1(17)(a) of the Interstate Commerce Act, 49 U.S.C. §1(17)(a)[9] provides that violation by a railroad or its agents and employees of the Commission's car service regulations shall be punishable by fine collected by civil forfeiture proceedings.

Section 10(1) of the Act, as amended, 49 U.S.C. §10(1), provides that a violation of the Act or anything required to be done by the Act[10] is a misdemeanor punishable by a fine upon conviction. Section 1 of the Elkins Act, 49 U.S.C. 41(1), also provides for criminal penalties for such violation.[11]

During the hearings before the examiner, the witnesses for the Commission took the view that only 80% compliance would be considered "a general good-faith attempt to comply" with the rules (Tr. 1572, App. 107). The examiner found that, in general, the proposed enforcement of the rules with "strictly controlled flexibility" and the expectation of 80% compliance did not provide "a comprehensible standard of enforcement." (H. Ex. 24, App. 30).

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[9]Enacted as part of the Esch Car Service Act in 1917, along with Section 1(14)(a), 40 Stat. 101.

[10]Presumably this would include anything required by the Commission, which is created by the Act.

[11]Whether or not shippers could be held liable under the Elkins Act for soliciting violations of the Commission's regulations, shippers could still be liable as aiders and abettors under the other statutes, Section 1(17)(a) and 10(1).

After the Commission acted to prescribe the rules in its report and order entered August 21, 1969, numerous parties filed petitions for reconsideration. Among them was one filed by the Association of American Railroads, an appellee here. The AAR opposed the mandatory rules, but, in the alternative, proposed a new Rule 19, as follows:

> "Exceptions to these rules for the purpose of further improving car supply and utilization, increasing availability of cars to their owners, improving the efficiency of railroad operations, or alleviating inequities or hardships, may be authorized by the Chairman of the Car Service Division, Association of American Railroads. Such exceptions as are authorized by said Chairman shall be filed with the Bureau of Operations, Interstate Commerce Commission, and shall be subject to suspension or cancellation by the Commission." (AAR Pet. for Recon. p. 89; App. 340)

Given the admitted need for flexibility in administering the rules, this proposal was cumbersome and dilatory, and would be unduly restrictive until enough exceptions were created to permit the required flexibility. A similar proposal by the Commission's Bureau of Operations[12] for obtaining exceptions from the AAR's Car Service Division subject to approval by the Commission was rejected by the examiner on these grounds (H. Ex. 40-41; App. 47-48).

No mention was made of the procedure rejected by the examiner in the decision of August 21, 1969. In its Order of February 18, 1970, the Commission prescribed a new Rule 19, unlike any proposed before, which provided for obtaining exceptions from the Commission's Bureau of Operations (J.S. App. 171-172).[13] In the absence of the exceptions procedures finally adopted, the enforcement of the

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[12]Note C to Car Service Rules 1, 2 and 3. (V.S. 3, Appendix A, p. 3).

[13]Rule 19 is applicable to all the prescribed rules, not just Rules 1 and 2.

Car Service Rules might be improper on the grounds they are too vague, as the district court noted (App. 25). But the more fundamental flaw pointed out by the district court is the lack of an "ascertainable standard of guilt," which makes the Car Service Rules unreasonable within the meaning of Section 1(14)(a) (ibid.).

The appellants' brief takes the position that even without the exceptions, criminal intent would have to be proved to impose criminal penalties, relying on *United States v. Southern Railway Co.*, 250 F. Supp. 759 (D. S.C. 1966). While that case could perhaps be read as supporting that proposition, it should be noted that the proceeding was a civil forfeiture under Section 1(17)(a) and not a criminal prosecution. Furthermore, such a principle would conflict with the long-established principle that criminal intent is not an essential element for conviction of a violation of a regulatory statute. See *Armour Packing Co. v. United States*, 209 U.S. 56, 85-86 (1908).

The exceptions procedures themselves, particularly with respect to Rule 19, were prescribed by the Commission without any support in the record and without adequate findings to justify them. The Commission apparently added these exceptions procedures in the belief they would avoid the problem of a comprehensive standard of enforcement. But the Commission has not complied with the Administrative Procedure Act in grafting these procedures onto the Car Service Rules. The Act requires reasoned findings and careful analysis to justify the choice the Commission has made in this matter, *Burlington Truck Lines v. United States*, 371 U.S. 156, 167 (1962). The Commission has not done so.[14]

In addition, the Commission has not properly justified its subsequent approval of exceptions procedures in Rule 19

[14]The only reference made to the procedures is a brief paragraph in the February 18, 1970, order noting that such procedures appear to be necessary.

similar to those rejected earlier by the examiner as dilatory and rigid (H. Ex. 40-41; App. 47-48). The standards established by *Greater Boston Television Corp. v. F.C.C.*, 444 F.2d 841, 853 (D.C. Cir., 1971) have not been satisfied.

CONCLUSION

Appellees are not disputing the delegation by Congress to the Commission of authority to deal with the problem of car supply, in Section 1(14)(a) of the Interstate Commerce Act. Nor are they disputing the proposition that a reviewing court may not substitute its policy choice for the course chosen by an agency acting pursuant to authority delegated by Congress. But given the sweeping discretion awarded to the Commission to exercise its expertise in this area, appellees contend that the Commission is required by the Administrative Procedure Act to clearly justify and properly support the choice of remedies it has made. A passage from *Burlington Truck Lines v. United States, supra,* at 168 also illuminates the problems presented by the Commission's report and orders here:

> "The agency must make findings that support its decision, and those findings must be supported by substantial evidence. [citations omitted] Here the Commission made no findings specifically directed to the choice between two vastly different remedies with vastly different consequences to the carriers and the public. Nor did it articulate any rational connection between the facts found and the choice made."

In addition, Section 1(14)(a) requires that regulations thereunder must be reasonable. The Commission has developed here a scheme of regulation that cannot meet that standard.

For all of the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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February, 1972

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No. 71-227

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,
Appellants,

v.

ALLEGHENY-LUDLUM STEEL CORPORATION, ET AL.,
Appellees.

On Appeal from the United States District Court for the Western District of Pennsylvania

---

BRIEF FOR APPELLEES ALLEGHENY-LUDLUM STEEL CORPORATION, ET AL.

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Appellees.

On Appeal from the United States District Court for the Western District of Pennsylvania

---

BRIEF FOR APPELLEES ALLEGHENY-LUDLUM STEEL CORPORATION, ET AL.

QUESTIONS PRESENTED

The principal question presented is whether the district court correctly enjoined the enforcement of certain car service rules promulgated by the Interstate Commerce Commission, which generally require that off-line freight cars be returned, either loaded or empty, in the direction of the railroad that owns them, whether or not the owning road wants or needs them and without regard to whether there is freight awaiting shipment at the point of unloading.

This question involves the following subsidiary questions:

1. Whether the Commission's effort to compel car-poor roads to purchase additional cars by enforcing a system of car distribution that will deprive such roads of adequate cars to serve their shippers is "reasonable" within the meaning of Section 1(14)(a) of the Interstate Commerce Act in the absence of findings by the Commission that such roads will be able to purchase cars and in the face of substantial and uncontroverted evidence that enforcement of the order will worsen car service and adversely affect competition among both carriers and shippers.

2. Whether the Commission's order can be sustained under the Administrative Procedure Act in the absence of evidence and findings that the order will improve car service or increase the size of the freight car fleet, and where, although compliance with the order is admittedly impossible, no adequate provision exists for securing relief from the order.

STATUTES INVOLVED

In addition to Section 1(14)(a) of the Interstate Commerce Act, 40 Stat. 101, as amended, 49 U.S.C. § 1(14)(a) (1970), set forth at page 3 of the Government's brief, the following statutes are involved in this case: Section 1(21) of the Interstate Commerce Act, 41 Stat. 478, as amended, 49 U.S.C. § 1(21) (1970); National Transportation Policy, 54 Stat. 899, 49 U.S.C. preceding § 1 (1970); Sections 7, 8, and 10(e) of the Administrative Procedure Act, 5 U.S.C. §§ 556, 557, 706 (1970). The full texts of these statutes are set forth in an appendix to this brief.

STATEMENT

This is an appeal from a unanimous opinion and judgment of a three-judge district court which enjoined

enforcement of the portion of an order of the Interstate Commerce Commission ("Commission") that prescribed two car service rules for mandatory observance by a majority of the nation's rail carriers. The decision of the Commission to make the rules obligatory was contrary to the recommended decision of the Hearing Examiner, who had evaluated the hundred odd statements admitted into evidence and had presided over the 50 day hearing; moreover, it was contrary to the position advanced by both the railroad industry and the shipping public that the order would have substantial adverse effects upon their operations.

The administrative proceedings that led to the order under review were begun in December of 1963 when the Commission undertook a study of "the adequacy of railroad freight car supply . . . ." 29 Fed. Reg. 119 (1964). The initial phase of the proceeding was ended in June of 1964 when the Commission announced "the existence of a substantial inadequacy of ownership in more than one category of freight cars throughout the United States."[1]

In July of 1964, the Commission commenced a formal rule making proceeding[2] investigating all phases of freight car ownership and use, and looking toward "the prescription of rules designed to alleviate the problem . . . ." (29 Fed. Reg. 11653, 11654 (1964).) During the course of that proceeding, a Commission witness proposed that certain car service rules, including Rules 1 and 2, be prescribed for mandatory observance. (V.S. 3, p. 118 (C. C. Robinson), App. 181.)[3]

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[1] *Investigation of Adequacy of Railroad Freight Car Ownership*, 323 I.C.C. 48, 60 (1964).

[2] The proceeding was instituted under § 1(14)(a), among others, of the Interstate Commerce Act, 49 U.S.C. § 1(14)(a) (1970).

[3] Verified statements submitted in the course of the administrative proceeding are cited as: "V.S." and reply verified statements are cited as "R.V.S." Testimony at the hearing is cited "Tr." Briefs

Rules regulating the use of freight cars have been in effect for many years among railroads and the Association of American Railroads ("AAR") for the purpose of providing reasonable car service for shippers of all classes. The rules have been regarded as guidelines, and strict adherence to them has never been required.[4] Car Service Rules 1 and 2 deal with the disposition of freight cars unloaded on the line of a railroad that does not own the car. In general, those rules require that such a "foreign" car must be returned, loaded or empty, to or in the direction of the road that owns the car. Such return, however, has never been mandatory, and has not been required when returning the car would have the effect of leaving freight unshipped at the point of unloading. Accordingly, when administered with flexibility and common sense, the rules have struck a balance between the need of the owning roads to have the use of the cars they have purchased, and the need of the non-owning roads to move the goods of the shippers located on their lines.

It was apparent to carriers and shippers that, if adopted, the proposal to require mandatory observance of AAR Rules 1 and 2 would radically restructure the nation's rail transport resources, and would deprive both the railroad industry and the shipping public of the benefits of flexible administration of the rules. They also recognized that the proposal would abolish the national freight car

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submitted following the hearing are cited as "[party's name] Br." The Hearing Examiner's report is cited as "H. Ex." The Commission's report and order and the opinion of the court below are reproduced in the Appendix to the Government's Jurisdicitional Statement and are cited as "J.S. App." Other pertinent materials are printed in the Joint Appendix filed with this Court, which is cited as "App."

[4] Indeed, present Car Service Rule 3 provides:

"Each originating carrier must use reasonable diligence to see that foreign cars are loaded or handled in accordance with provisions of Car Service Rules." (J.S. App. 129.)

pool, with its underlying policy of maximum utilization through the movement of cars to the nearest freight needing shipment, and would substitute individual pools of cars to be used by each railroad. Accordingly, the proposal provoked an immediate and overwhelming negative response from both the railroads [5] and the shipping public; indeed, at least 20 major shippers and shipper organizations which had not previously participated in the proceeding intervened and opposed mandatory observance of the rules.[6]

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[5] Contrary to the Government's assertion (Govt. Br. 10), railroads did not advocate mandatory observance of Car Service Rules 1 and 2 as a method for increasing freight car ownership. The evidence of one of the three railroads cited by the Government in the text was stricken from the record (V.S. 16, pp. 12-13 (Northern Pac.), App. 194-95; Tr. 4015-16, App. 337); the testimony of the second concerned the railroad's *own* efforts to comply (V.S. 17, pp. 2, 11 (Penna. R.R.), App. 198); and that of the third did not focus on Rules 1 and 2. (V.S. 10, pp. 2, 3 (Gt. Northern), App. 190). In any event, the Great Northern proposal was designed to increase efficient use of existing cars, not to increase the number of those cars.

[6] The statements of shippers cited by the Government in support of the rules are misleading. For example, according to the Government, the American Plywood Association "proposed a rule to achieve return of cars 'in accordance with the present AAR car service rules . . . .'" (Govt. Br. 10.) In fact, however, Plywood's proposal (V.S. 27, p. 10, App. 206) differs significantly from the order under review since it would have returned cars to the territory from which a shipment originated, not to the owners of the cars used for the shipment. Similarly, while the Government cites the verified statement of the Secretary of Agriculture for the proposition that mandatory observance of the rules would alleviate car shortages in certain areas of the country (Govt. Br. 11, n. 13), the Secretary in fact supported the proposal on *an interim basis only* and solely for the purpose of obtaining better *data* on freight car utilization—not for the purpose of increasing supply or utilization. The Secretary specifically stated that he did "not accept the premise, that the mandatory aspect of Rules 1, 2, 3, and 4, will necessarily result in improved utility of equipment on a regional or national basis, or that absolute enforcement of these rules could possibly result in the optimum utilization of equipment." (R.V.S. 81, p. 8, App. 309.)

The nature of the shippers' opposition was varied. Some testified that mandatory observance would contribute to shipment delays, since carriers would not be permitted to supply cars of inappropriate ownership even when cars of appropriate ownership were not available; others pointed out that even when cars of appropriate ownership were available, increased switching and the necessity of reloading to accommodate changes in destination because of changes in customer needs would increase the cost of rail transportation while impairing its efficiency.[7] The National Industrial Traffic League testified that "what are now voluntary rules for the guidance of railroad management, become in effect statutes with which the shipper is encumbered" (R.V.S. 76, p. 2, App. 300),[8] and the National Association of Shippers Advisory Boards stated that mandatory observance of the rules

> "would work unnecessary hardships on shippers, limit routing and actually delay shipment. They would create red tape but not improve utilization." R.V.S. 74, p. 9, App. 298.

The steel company appellees in particular presented extensive and uncontroverted evidence that requiring mandatory observance of Car Service Rules 1 and 2 would have disastrous effects. Throughout the years, steel mills have been located and expanded in reliance upon the railroads' practice of providing access for shippers to a national car pool, without concern for the individual capa-

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[7] *See, e.g.*, R.V.S. 63, pp. 2-3 (Coal Traffic Bureau), App. 277-78; R.V.S. 67, pp. 2, 4-6 (Gypsum Ass'n), App. 282, 283-84; R.V.S. 72, pp. 2-3 (Manufacturing Chemists' Ass'n), App. 295-96; R.V.S. 74, pp. 6-7 (National Ass'n of Shippers Advisory Boards), App. 297-98; R.V.S. 76, pp. 3-7 (National Industrial Traffic (NIT) League), App. 300-03.

[8] *See also, e.g.*, R.V.S. 63, p. 2 (Coal Traffic Bureau), App. 277; R.V.S. 67, p. 2 (Gypsum Ass'n), App. 282.

bility of the specific line serving a given plant.[9] If railroad practices were changed and railroads were required to adhere strictly to Car Service Rules 1 and 2, those steel companies that suffer the bad fortune of having been located on car-poor lines would be severely restricted in their ability to compete.[10] Some steel companies presented uncontroverted evidence that they lacked sufficient yard and switching space to provide a car of proper ownership for any particular load,[11] and that shipping delays would cause production slowdowns, bottlenecks in the production process, or disable mills from filling some orders.[12] All of the appellee steel companies presented uncontroverted evidence that perfect compliance with the rules was simply impossible.[13] Taken as a whole, this evidence established that, as a practical matter, the effect of the Commission's order would be to limit severely the ability of many plants to produce and ship steel.

Following the receipt of that and other evidence in the form of verified statements and replies, the proceeding was referred to a hearing examiner for the taking of testimony and cross examination. The hearing lasted approximately 50 days and produced nearly 6,000 pages of testimony. After the conclusion of the hearing, in January, 1968, the Examiner issued a 63 page recommended report and order setting forth the record evidence, his findings of fact, and his recommended decision.

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[9] *See, e.g.*, R.V.S. 14, p. 9 (E., J. & E. Ry.), App. 226-27; R.V.S. 41, p. 2 (AISI), App. 249; R.V.S. 86, pp. 6-7, 16, 18 (Youngstown Sheet & Tube Co.), App. 330, 332-33.

[10] *See, e.g.*, R.V.S. 82, p. 16 (U.S. Steel Corp.), App. 311. *See also* R.V.S. 76, p. 4 (NIT League), App. 301.

[11] *See, e.g.*, R.V.S. 41, p. 8 (AISI), App. 252; R.V.S. 58, pp. 8, 18 (Bethlehem Steel Corp.), App. 268, 274.

[12] *See, e.g.*, R.V.S. 69, p. 8 (Inland Steel Co.), App. 289; R.V.S. 85, p. 3 (Wheeling Steel Corp.), App. 326; R.V.S. 86, pp. 7, 22-23 (Youngstown Sheet & Tube Co.), App. 330, 334-35.

[13] *See, e.g.*, R.V.S. 41, pp. 8-9 (AISI), App. 252-53; R.V.S. 58, pp. 16-17 (Bethlehem Steel Corp.), App. 273; R.V.S. 70, pp. 5-6 (J. & L. Steel Corp.), App. 292-93.

Not surprisingly, the Hearing Examiner was unequivocal in his finding that mandatory observance of Car Service Rules 1 and 2 would adversely affect the shipping public:

> "the weight of the evidence; and arguments based thereon, compel the conclusion that mandatory rules would be of substantial detriment to rail carriers and shippers . . . ." H. Ex. 27, App. 33.

And on the basis of the evidence described above, he made unequivocal findings concering the effect of the rules on the steel industry. Thus, with respect to forecasting he found:

> "If required by mandatory car service rules to predict routing and destination of individual shipments to be loaded on a specific day the steel companies would be faced with a requirement impossible to meet. In fact it would not be possible to improve the accuracy of forecasting without drastic changes in processing, storage, and marketing practices." H. Ex. 26, App. 32.

Similarly, with respect to switching capabilities, the Examiner concluded:

> "If the plant is among those where a large proportion of the cars used for shipments have arrived under load, the necessary increase in switching would exceed the physical capabilities of the plant and the serving carriers beyond the point of rectification." H. Ex. 27, App. 32-33.

Finally, after a scrupulous review of the evidence, the Examiner concluded his recommended report and order as follows:

> "Upon considering all of the evidence the hearing examiner finds that the record does not contain competent evidence upon which to base a conclusion as to the adequacy of freight car ownership; and that the adoption of the proposed car ownership formula,

regulations, and car service rules has not been shown to be justified." H. Ex. 63, App. 71.

Only the Commission's Bureau of Enforcement, which had first proposed mandatory observance of the car service rules, filed exceptions to the Hearing Examiner's finding that such observance was not justified. Nonetheless, on August 19, 1969, Division 3 of the Commission rejected the Examiner's carefully supported conclusion, and issued a report prescribing these car service rules for mandatory observance.[14] Beginning with the premise that there existed a chronic shortage of general purpose freight cars, the Commission concluded that the remedy for that shortage lay in prescribing car service rules, including Rules 1 and 2, for mandatory observance. (J.S. App. 88, 156-57.) In doing so the Commission recognized that imposition of the rules would not improve the utilization of freight cars "except insofar as return loading is compatible with the primary objective of increasing availability of cars to the owner" (J.S. App. 65), and that its order would exacerbate shortages on car-poor roads. It held, nevertheless, that the needs of shippers so deprived of access to rail transportation "should not be met with equipment of carriers which obtained the cars to serve other shippers." (J.S. App. 66.)[15]

On review, the district court accepted *arguendo* the Commission's conclusion that a shortage of general purpose freight cars existed. However, it recognized that the Commission had utterly failed to make findings upon which mandatory observance of Car Service Rules 1 and 2 was, or could be, based. The court first observed that

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[14] J.S. App. 28-89.

[15] In addition to prescribing mandatory observance of these car service rules, the Commission's order required the respondent railroads to prepare annual reports showing the results of an application of certain data to a car ownership formula approved by the Commission and further showing the steps, if any, taken to cure any indicated inadequacies. J.S. App. 88, 149-56.

although the Commission sought to alleviate the car shortage problem by returning the cars on foreign lines to their owners, the Commission had not found that the shortage was more acute on the owners' lines. (J.S. App. 19.) It then expressed particular concern with the Commission's failure to consider the financial effects of its order upon the non-owner lines and their shippers, despite the fact that a requirement for a car-poor carrier to increase its fleet would "of necessity, produce substantial effects on the railroad industry and the shipping public." (J.S. App. 20.) Further, the court was alarmed by the Commission's prescription of mandatory rules with which compliance was admittedly impossible but whose violation carried criminal penalties. (J.S. App. 25.) The court, therefore, held that the rules, when prescribed for mandatory observance, were not "reasonable" within the meaning of Section 1(14)(a) of the Interstate Commerce Act.[16]

SUMMARY OF ARGUMENT

1. The district court was clearly correct in concluding that Car Service Rules 1 and 2, when prescribed for mandatory observance, are not "reasonable" within the meaning of Section 1(14)(a) of the Interstate Commerce Act. In the first place, the history and structure of the Act require rejection of the argument, advanced by the Government, that Congress intended to permit the Commission to impose car service rules as a technique for increasing the number of cars owned by the nation's railroads. The legislative history of the Esch Act shows that Congress rejected making the car service rules mandatory by requiring their inclusion in the carriers' tariffs. Moreover, the use of the rules to enlarge the exist-

[16] Subsequently, a three-judge district court for the Middle District of Florida upheld the Commission's Order. *Florida East Coast Ry.* v. *United States*, 327 F. Supp. 1076 (1971). The Florida court considered not only the Commission's prescription of Car Service Rules 1 and 2 for mandatory observance but also its adoption of a car ownership formula.

ing car fleet by coercing railroads to purchase cars is, without a solid showing of the ability of the affected roads to purchase cars, not only unreasonable, it is an evasion of the statute that the Court should not permit. Section 1(21) expressly prohibits the Commission from requiring a carrier to acquire additional facilities unless it finds that the railroad is financially capable of doing so without impairing its ability to serve the public. Whether or not the section applies to freight cars, it embodies a clear and reasonable congressional policy that railroads should not be required to make acquisitions which are financially impracticable or which will significantly weaken their financial structure. Clearly, the Commission should not be permitted to avoid the sound congressional policy embodied in Section 1(21) by requiring car-poor roads to purchase cars without finding, on the basis of substantial evidence, that they will be able to do so.

In the second place, the harm mandatory observance of the rules will cause the shippers and the railroads alike illustrates the unreasonableness of the order. Mandatory observance of the rules will immediately aggravate the problems caused by any existing car shortage, with no assurance that any increase in the freight car fleet will be achieved. In addition, the order will inevitably alter competitive strengths of both shippers and carriers. It will, moreover, significantly curtail the access of some shippers to rail transportation. These facts alone illustrate the soundness of the district court's conclusion that prescription of the rules for mandatory observance is not "reasonable."

2. Not only does the Commission's order fail to meet the substantive test of "reasonableness," it fails to measure up to the standards imposed upon the agency by the Administrative Procedure Act. When, as in the present case, the Commission's action will accomplish a major reallocation of the nation's rail transportation capacity with obvious and far-reaching effects upon shippers and

carriers alike, good sense alone requires that the agency action reflect a reasoned consideration of those consequences and that it rest upon solid findings grounded in substantial evidence. In this, the Commission failed utterly. It did not find that mandatory observance of Car Service Rules 1 and 2 would increase efficient use of the existing car fleet, nor did it find that such observance would achieve the stated objective of increasing the national car fleet. It gave no consideration to the obvious question whether shippers located on owning roads were in greater need than others. And there was no consideration or record evidence of the financial ability of car-poor roads, once deprived of access to the national car fleet, to remedy their inadequate ownership by purchasing additional cars. Finally, the Commission did not make any findings that the provision for exceptions from the rules would be effective. Thus, the Commission's order fails to meet the minimal requirements of the Administrative Procedure Act that it be based on reasoned findings supported by substantial evidence.

ARGUMENT

I.

THE COMMISSION'S ORDER IS NOT "REASONABLE" WITHIN THE MEANING OF SECTION 1(14)(a) OF THE INTERSTATE COMMERCE ACT.

The particular statutory standard against which rules with respect to car service [17] must be measured appears in Section 1(14)(a) of the Interstate Commerce Act ("Act"), which provides in relevant part that:

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[17] "Car service" is defined by Section 1(10) of the Act to include: "the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars and other vehicles used in the transportation of property . . . ." 49 U.S.C. § 1(10) (1970).

> "The Commission may, after hearing . . . establish *reasonable* rules, regulations, and practices with respect to car service by common carriers by railroad subject to this chapter. . . ." 49 U.S.C. § 1(14)(a) (1970) (emphasis supplied).[18]

The statute thus imposes a requirement of reasonableness that is substantively distinct from and additional to the notion generally dealt with by courts in reviewing administrative orders. An order prescribing car service rules which meets the "procedural" standards set forth in the Administrative Procedure Act may nevertheless fail to meet the test of reasonableness imposed by Section 1(14)(a).

It is our view that the court below was clearly correct in concluding that the Commission's order is not "reasonable" within the meaning of Section 1(14)(a). First, an order prescribing mandatory observance of certain car service rules for the purpose of increasing the size of the nation's freight car fleet is not reasonable where, as here, there is no finding that the car-poor carriers would be able to purchase additional cars without impairing their ability to serve the public. Second, the harm that the Commission's order will inevitably cause to the nation's rail carriers and shipping public is such as to preclude any determination by a reviewing court that the Commission's order is reasonable.

A. The Relevant Provisions of the Act Do Not Support the Reasonableness of the Commission's Order.

Two sections of the Act are relevant to this Court's review of the Commission's order. The first, relied upon by the Commission, is Section 1(14)(a), which authorizes the Commission to establish reasonable rules with

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[18] Section 1(14)(a) was amended on May 26, 1966, during the course of the proceedings below. However, the amendment did not affect the first sentence of the section, quoted in text. Pub. L. 89-430, § 1, 80 Stat. 168.

respect to car service. The second, ignored by the Commission, is Section 1(21), which authorizes the Commission under certain circumstances to require railroads to purchase additional facilities. Both illustrate the unreasonableness of the order under review.

1. The Legislative History of Section 1(14)(a) Does Not Support the Order.

The Government argues that the legislative history of the Esch Car Service Act of 1917, which added Section 1(14) to the Act, establishes the reasonableness of the Commission's prescription of Car Service Rules 1 and 2 for mandatory observance. (Govt. Br. 19-24.) In essence, the Government argues that in 1917, as in 1970, the nation was plagued by a severe car shortage and at that time Congress sought to remedy the situation by authorizing the Commission to enforce the railroad industry's voluntary code of car service rules. However, the legislative history does not support the Government's position.

During the First World War, concern arose as to the ability of the nation's carriers to meet the war-time demands of the shipping public. The Commission responded by making certain of the railroad industry's car service rules mandatory for less than three months as to specified types of cars which were in particularly short supply.[19] Because there was some "question of the Commission's jurisdiction" to enter such an order,[20] the Commission sought clarifying legislation.[21] Such legislation was introduced by Representative Esch, and authorized Commission regulation of car service in *emergency* situa-

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[19] *Car Supply Investigation*, 42 I.C.C. 657, 674-76 (1917).

[20] 42 I.C.C. at 670-71.

[21] *See* Interstate Commerce Commission, 30th Annual Report, pp. 91-92 (1916).

tions without a hearing.[22] After the bill was passed by the House and sent to the Senate, consideration was given to the question of Commission authority to regulate car service in *non-emergency* periods.[23] The original Esch bill became Section 1(15) of the Act—not at issue here—while the language added by the Senate, conferring authority to regulate car service in non-emergency periods, became Section 1(14). Thus, the Government's references to the legislative history of the Esch bill are largely irrelevant.

In any event, it is clear that both the particular problem to which the Esch Act was directed and the substance of the legislative solution adopted are wholly different from the Commission's purpose and regulatory action in the present case. As noted above, the Esch Act was proposed in response to a growing concern that the shipping public was not being adequately served by the nation's carriers. But the issue was not the *number* of freight cars. Indeed, then-Chairman Hall of the Commission expressly stated in hearings before the House that "it has not been demonstrated that the trouble in this country is lack of rolling equipment."[24] Rather, the Congress and the Commission were focusing on the *distribution* of the existing freight car fleet. In reporting the bill to the Senate, Senator Pomerene said:

> "I desire to state in presenting the report that the purpose of the committee is to confer fuller author-

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[22] The Commission itself had focused solely on its emergency powers. *See, e.g.*, Govt. Br. 21, citing from 42 I.C.C. at 674. The Esch bill, H.R. 20352, 64th Cong., 2d Sess., reintroduced as H.R. 328, 65th Cong., 1st Sess., is discussed in Hearings on H.R. 19564, H.R. 20256 and H.R. 20352 Before the House Committee on Interstate and Foreign Commerce, 64th Cong., 2d Sess. (1917) ("House Hearings"). *See also* House Hearings, 32.

[23] *See* Hearings on S. 636 Before the Subcommittee of the Senate Committee on Interstate Commerce, 65th Cong., 1st Sess. (1917) ("Senate Hearings"), 30, 32.

[24] House Hearings, 71. *See also* Commissioner Hall's comments at House Hearings, 15.

> ity upon the Interstate Commerce Commission in connection with the distribution of cars."[25]

No mention was made, either in the Senate or in the House, of an intention to increase the ownership of freight cars. The instant case stands in stark contrast, for the Commission's report and the Government's brief both acknowledge that the "purpose of the Commission's order is to increase the *supply* of freight cars," not to improve the efficient distribution of the existing fleet. (Govt. Br. 17, emphasis in original.)

Furthermore, the Government grossly mischaracterizes the legislative solution to the problem—whether it be supply or distribution—when it says that the Act "authorize[d] the Commission to prescribe mandatory car-service rules such as those already voluntarily adopted by the rail industry." (Govt. Br. 22.) Congress expressly considered the desirability of mandatory observance of the car service rules and it rejected such a provision. The original bill in the House contained language requiring carriers to file the car service rules as part of their tariffs.[26] However, following testimony during the Senate hearings to the effect that such treatment of the car service rules would have severe adverse effects,[27] this language was stricken. Thus, although the references

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[25] 55 Cong. Rec. 2631 (1917). The Senate Report stated that "[t]he purpose of the . . . amendment . . . [was] to give the Commission plenary power over the "movement, distribution, exchange, interchange and return of cars. . . ." S. Rep. No. 43, 65th Cong., 1st Sess. 2 (1917). The term "movement, distribution, exchange, interchange and return of cars" was taken from the definition of "car service" which was added to Section 1 of the Act by the Esch Act. Act of May 29, 1917, ch. 23, 40 Stat. 101.

[26] *See* H. Rep. No. 18, 65th Cong., 1st Sess., 13 (1917).

[27] *See, e.g.*, Senate Hearings, 12.

cited by the Government indicate that Congress may have believed it desirable to achieve better observance of the industry's car service rules, Congress clearly refused to adopt an extreme measure like that advanced by the Commission here.[28]

2. The Commission's Effort To Require Carriers To Purchase Cars, Without any Finding of Their Financial Ability To Do So, Is Inconsistent With the Policy of Section 1(21) of the Act.

This Court has held that each section of the Act should "be given a reasonable construction with a view to carrying out all the provisions of the Act and to make every part of it effective, in accordance with the intention of Congress." *Pennsylvania Co.* v. *United States*, 236 U.S. 351, 366 (1915). Accordingly, in determining the reasonableness of the Commission's order under Section 1 (14) (a), the Court should consider Section 1(21) of the Act.

Section 1(21) confers upon the Commission authority to compel railroads to acquire additional equipment. However, no such acquisitions can be required unless the Commission finds that "the expense involved therein will not impair the ability of the carrier to perform its duty to the public." Whether or not Section 1(21) applies to

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[28] No matter how broadly the Government reads the legislative history of Section 1(14) (a), there is no basis for its claim that the district court has "largely negated" the "statutory discretion and power . . . vested in the Commission by Congress" by requiring the Commission to make findings sufficient to support its conclusion. (Govt. Br. 23.) According to that theory, if power exists, it may be exercised without regard to other legal principles, including those that require an agency to make findings based on substantial evidence and to prepare a written report upon which judicial review is based. Such a position is not only inconsistent with the principles of administrative law, it wreaks havoc with the requirement for "hearing" in Section 1(14) (a).

acquisition of freight cars,[29] it evidences a clear and reasonable congressional determination that railroads should not be required to make expenditures that are financially impracticable or will significantly weaken their financial structure.

This policy is plainly relevant here. The Commission's order is designed to increase freight car ownership by compelling car-poor carriers to acquire additional cars. However, as we show below,[30] the Commission made no findings—nor is there any evidence of record from which findings could be made—that the affected carriers would in fact be able to purchase additional cars. Thus, it is clear that the Commission has attempted to achieve by indirect means that which Section 1(21) specifically prohibits it from doing directly. The Court should not permit the Commission to accomplish this obvious circumvention of the policy of the Act.

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[29] The language of Section 1(21) employs the general term "facilities" rather than specifically referring to freight cars. However, in the legislative history of Section 1(21), the House Committee on Interstate and Foreign Commerce commented:

> "In a recent decision of the Supreme Court of the United States [*United States* v. *Pennsylvania R.R.*, 242 U.S. 208 (1916)] it was held that under the Commerce Act the Commission does not have the [statutory] authority to order a common carrier to supply itself with certain cars. The pending bill [the Transportation Act of 1920] gives the Commission such authority." H. Rep. No. 456, 66th Cong., 1st Sess. 17.

See also General American Tank Car Corp. v. *El Dorado Terminal Co.*, 308 U.S. 422, 428 (1940), in which this Court stated "[f]reight cars are facilities of transportation, as defined by the Act."

[30] *See, infra*, at 33-34.

B. The Injury that the Commission's Order Will Cause the Nation's Rail Carriers and Shipping Public Shows that the Order Is Unreasonable.

In its effort to increase the size of the freight car fleet, the Commission has wrought a major change in the present distribution of freight cars. Whether or not the means selected will ultimately succeed, it is clear that the order will have immediate adverse effects on railroads and shippers in at least two ways. First, any present freight car shortages will be immediately and substantially aggravated rather than alleviated. Second, contrary to the National Transportation Policy, the financial condition of car-poor carriers will be impaired and competition among shippers and carriers will be adversely affected. Each of these factors should be considered, we submit, in determining the substantive reasonableness of the Commission's order; taken together they conclusively demonstrate that that order is unreasonable.[31]

1. The Commission's Order Will Aggravate Rather Than Alleviate the Present Car Shortage Problem.

The Commission's ultimate conclusion was that "there is a continuing freight car shortage which requires affirmative, remedial action at this time." (J.S. App. 87.) It is apparent that such remedial action might take either of two forms. One would be to increase the number of cars in the freight car fleet. But the Commission has

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[31] The Government argues that "the fact that the operation of the car service rules adopted by the Commission 'would resemble the practice' of the railroad industry is itself strong evidence of the reasonableness of the rules." (Govt. Br. 27.) Although such "evidence" is the strongest that the Government can assemble here, its position is incredible since mandatory observance is wholly at odds with the industry's voluntary guidelines approach. Moreover, imposing the rules to achieve an increase in the size of the freight car fleet in no way resembles the practice of the industry, which uses the rules to obtain maximum use of the existing fleet.

not found that even a single freight car will be added to the fleet as a result of its order. *See infra*, at 33-34.

The second remedy would be to increase the efficiency of use of the existing fleet. We need not even speculate whether the Commission's order will have that effect, for the Commission has stated that it will not. Referring to Car Service Rules 1 and 2, the Commission volunteered:

> "They are not designed to improve the utilization of freight cars, except insofar as the return loading is compatible with the primary objective of increasing availability of cars to the owner." J.S. App. 65.

There is no reason to wonder whether "increasing availability of cars to the owner" will promote efficient car utilization. Returning cars to their owners (whether they want them or not), rather than sending them in the direction of freight awaiting shipment, *decreases* rather than *increases* the efficiency of the car fleet as a whole. The Government has conceded as much,[32] and the Commission, in an earlier consideration of the problems caused by car shortages, has so found:

> "In periods like the present, when the car supply falls short of demands, maximum tonnage is handled by permitting cars to be reloaded immediately after a load is removed, without regard to ownership of cars or destination of shipments." *Car Service, Freight Cars*, 268 I.C.C. 687, 690 (1947).

In that proceeding, the Commission's conclusion was based in part upon its finding that mandatory observ-

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[32] In its Memorandum in Opposition to the Motions to Affirm, p. 1, the Government stated:

> "If the responsibility of the Interstate Commerce Commission for assuring to the shippers of this Nation the availability of railroad freight cars were limited to regulating the distribution of existing freight cars to provide for maximum utilization, we might agree with the view that the Car Service Rules at issue should not have been promulgated for mandatory observance . . . ."

ance of car service rules, particularly in times of shortage, would cause an increase in the empty mileage and empty car days experienced by the carriers, with the result that the aggregate carrying capacity of the fleet would be materially reduced.[33] In this case, the Commission boldly asserts the contrary: "empty car miles will be reduced in the long run if cars are used in accordance with the rules." (J.S. App. 67.) Aside from the absence of record evidence to support this assertion, there is no rationale advanced to explain the Commission's departure from its earlier substantiated finding. As this Court stated in *Secretary of Agriculture* v. *United States*, 347 U.S. 645, 653-54 (1954):

> "We do not know whether the Commission has disregarded its own findings . . . or whether . . . the Commission has modified the normal doctrine . . . or whether the Commission, for a reason not made explicit, has here deemed irrelevant the prevailing rule of its prior cases . . . ."

Whatever the reason for the Commission's statement with respect to empty car miles in this case, its finding and the Government's concession that mandatory observance of car service rules will not increase utilization of the existing car fleet are sufficient to enable this Court to conclude that the Commission's order will not alleviate, and in fact will immediately aggravate, the

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[33] The Commission stated:

> "On March 1, 1947, boxcars were scattered to such an extent that class I railroads had on their rails but 16.4 percent of the units owned. If the Association or the Commission should now enter an order requiring rigid observance of the car-service rules, carriers would be obliged to immediately start cars rolling in the direction of the owning roads, loaded or empty, and, because of cross hauling over direct and indirect routes of empty cars, when loads in the direction of the home road were not available, the aggregate volume of traffic handled might be materially reduced." *Car Service, Freight Cars, supra*, 268 I.C.C. at 691.

problems which the Commission addressed. Under these circumstances, we submit, the Commission's order cannot be construed as "reasonable."

Moreover, because the Commission's order will have the immediate effect of increasing the severity of any car shortage to the detriment of shippers, it contravenes the essential purpose of the Act—protection of the shipping public. That this is the statutory standard against which Commission action must be measured has repeatedly been recognized both by the courts[34] and the Commission.[35] Accordingly, Commission action must be calculated to achieve an improvement in car service in order to be sustained as "reasonable." Where, as here, the effect of Commission action is to impair car service, it is not reasonable within the meaning of Section 1(14)(a) and should be set aside.[36]

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[34] *See, e.g., Schaeffer Transportation Co.* v. *United States*, 355 U.S. 83, 92 (1957), where this Court set aside an I.C.C. order because the Commission failed to evaluate the benefits of the proposed transportation service to the shipping public.

[35] In its earlier report in this proceeding, the Commission stated that it was seeking to determine the extent to which carriers were able to meet "shipper requirements for cars." 323 I.C.C. 48 (1964). *See also, e.g., Car Service, Freight Cars, supra*, 268 I.C.C. at 703, where the Commission noted that any failure of the railroads to furnish adequate car service worked "to the detriment of the shipping public."

[36] *See, e.g., Atlantic Coast Line R.R.* v. *United States*, 112 F. Supp. 594, 597 (Ct. Cl. 1953), where the Court of Claims held that, under Section 1(15) of the Act governing the issuance of emergency orders respecting car service, "the Commission could not take action, the only effect of which would be to make car service worse."

2. The Adverse Effect of the Commission's Order Upon Competition Among Shippers and Carriers Is Inconsistent With the National Transportation Policy.

The National Transportation Policy [37] enjoins the Commission to administer the Act so as

> "to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers . . . ."

Consistent with that Policy, the Commission must be sensitive to the "policies embodied in other legislation enacted at different times and with different problems in view." *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 80 (1944). In *Denver & R.G.W. R.R.* v. *United States*, 387 U.S. 485, 492-94 (1967), this Court expressly recognized the Commission's obligation, placed upon it by the National Transportation Policy, to consider the anti-competitive effect of a proposed merger or acquisition. The Commission, too, has recognized that it

> "may not ignore [the policy favoring competition] as a relevant factor in fostering the objectives of the national transportation policy . . . ." *Contract Rates, Rugs & Carpeting from Amsterdam, N. Y.*, 313 I.C.C. 247, 253 (1961), *aff'd sub nom., New York Central R.R.* v. *United States*, 194 F. Supp. 947 (S.D.N.Y. 1961), *aff'd per curiam*, 368 U.S. 349 (1962).[38]

Indeed, we submit that the Commission is under an affirmative obligation to appraise the effects of the curtailment of competition and of the public benefits, if any, to be derived from such curtailment, in determining whether prescription of the rules for mandatory observ-

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[37] 49 U.S.C., preceding § 1, 54 Stat. 899 (1940).

[38] *See also Pennsylvania R.R.—Merger—New York Central R.R.*, 327 I.C.C. 475, *aff'd sub nom., Erie-Lackawanna R.R.* v. *United States*, 259 F. Supp. 964 (S.D.N.Y. 1966), *rev'd on other grounds sub nom., Baltimore & Ohio R.R.* v. *United States*, 386 U.S. 372 (1967).

ance is consistent with the public interest and the National Transportation Policy. In *McLean Trucking Co., supra*, this Court stated that resolving such conflicting considerations

> "is a complex task which requires extensive facilities, expert judgment and considerable knowledge of the transportation industry. Congress left that task to the Commission 'to the end that the wisdom and experience of that Commission may be used . . . .'" 321 U.S. at 87.

In the present case it cannot fairly be said that the Commission discharged its obligation.

a. *Competition among shippers.*

The competitive position of many businesses depends upon their access to transportation service not inferior to that available to their competitors. Indeed, the steel industry presented evidence in this proceeding to demonstrate that their customers frequently order from the mill that can provide the fastest delivery.[39] However, if mandatory observance of Car Service Rules 1 and 2 is required, the ability of shippers to compete will depend in some measure upon the accident of location—*i.e.*, upon the adequacy of the car ownership of the individual railroad providing the originating service. Thus, business firms that located their plants and designed their production and shipping facilities in reliance upon the railroad industry's practice of free access to and use of cars in the national freight car fleet[40] will be arbitrarily deprived of reasonable access to rail transportation services if the lines on which they are located are among the car-poor carriers. Under these circumstances, the effect of the order will be to lessen the importance among shippers of traditional

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[39] *See, e.g.*, R.V.S. 85, p. 5 (Wheeling Steel Corp.), App. 327; R.V.S. 86, p. 7 (Youngstown Sheet & Tube Co.), App. 330.

[40] *See supra*, at 6-7.

competitive factors—*i.e.*, price, quality, special features, maintenance and support capabilities—and reward instead the fortuity of location upon a line with an adequate car supply.

b. *Competition among carriers.*

The nation's rail system is made up of large and small originating carriers of diverse economic strengths. These carriers compete with each other to serve shippers on their lines. Smaller carriers are able to compete effectively only because they have access to a general pool of cars. By eliminating the smaller carriers' access to this car pool, the Commission's order will severely impair the ability of those carriers to compete.

In the first place, the immediate effect of the Commission's order will be to divert shipping revenues from these carriers to the high-ownership lines. On its face, therefore, the Commission's order seems irreconcilable with the mandate of the National Transportation Policy that the Commission "foster sound economic conditions in transportation and among the several carriers." The conflict is particularly glaring in view of this Court's recognition that one of the factors in fostering "sound economic conditions" is "protecting existing carriers' revenues." *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 167 (1962).

In the second place, the Commission acted in part on the unfounded assumption that the shorter or weaker lines would offset the loss of access occasioned by strict enforcement of the rules by purchasing additional equipment. As is discussed *infra*, at 33-34, the assumption that the weaker lines will be able to purchase additional equipment, even assuming no immediate loss of revenues, is without support in the record,[41] and cannot be sup-

[41] On argument to the court below, the General Counsel of the Commission admitted that there was no "testimony on the record

ported in fact.[42] Many carriers are simply not able to cure inadequacies in freight car ownership by purchasing additional cars; they will thus be unable to avoid the Commission-imposed limitation on their ability to compete.

Not only will the Commission's order limit the ability of the weaker carriers to compete with the stronger carriers, but, over a period of time, it will enable the stronger carriers to increase imbalances in strength. There are many situations where a stronger and a weaker carrier each serve a single location but neither owns an adequate number of cars to satisfy the needs of the shippers at that location.[43] If strict enforcement of Car Service Rules 1 and 2 will, as the Commission presumes, encourage carriers to purchase the needed equipment, it is likely that, while the stronger carrier may be able to expand its fleet, the weaker will not. And as the stronger carrier expands its freight car ownership, it will also expand its share of the originating traffic until it dominates the market—a result totally inconsistent with the basic antitrust policy against undue market concentration. *See United States* v. *Philadelphia Nat'l Bank*, 374

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indicating the capacity of railroads to increase their fleets and to provide better maintenance for their cars." Tr. Oral Arg. 13, App. 5.

[42] Indeed, Chairman Stafford of the Commission testified at congressional hearings cited by the Government (Govt. Br. 8) that in order to remedy the deficiency in the nation's freight car fleet "[b]illions of dollars are needed; [but] the present economic condition of the railroads precludes their meeting the challenge." Hearings Before the Special Committee on Freight Car Shortages of the Senate Committee on Commerce on S. 1415, S. 1729, S. 1730 and S. 1731, 92d Cong., 1st Sess., 239 (1971).

[43] *See, e.g.*, R.V.S. 86, pp. 18, 21 (Youngstown Sheet & Tube Co.), App. 333-34, which discusses the situation at Youngstown's Campbell plant, which is served by at least one relatively strong road—the B. & O.—and two weak lines—the Penn Central and the Erie Lackawanna.

U.S. 321 (1963). *See also Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962).

A second anti-competitive effect of the rules arises in situations where a long-haul carrier competes for traffic with a short-haul carrier. The situation at the Fairless, Pennsylvania plant of U.S. Steel is typical. That plant is served by Reading and Penn Central. The Reading ownership of gondola cars amounted to 3,848 and that of the Pennsylvania Railroad and New York Central Railroad to 46,437 on December 31, 1964. (V.S. 2, Exhibit 8, p. 7, App. 156.) Only small proportions of the shipments originated by shorter lines move to destinations on those lines. Obviously the smaller car supply of Reading will be depleted and moved to the lines of other railroads more rapidly than the larger supply of Penn Central, which serves many more destinations. Reading would thus be increasingly less able to compete with Penn Central to supply the plant at Fairless with cars suitable for routing to all destinations.[44]

A final anticompetitive effect derives from denial to shippers of their right to select routes. Shippers have long possessed the right fully to control the routing of their shipments. This right is guaranteed by the Act, 49 U.S.C. § 15(8) (1970), and has been consistently upheld by the Commission and the courts. *See, e.g., Johnson Machine Works, Inc.* v. *Chicago, B. & Q. R.R.*, 297 F.2d 793 (8th Cir. 1962); *Electric Boat Division* v. *New York, N.H. & H. R.R.*, 316 I.C.C. 313 (1962). The fact that a shipper may have a choice of carriers provides a strong incentive for vigorous competition among carriers and enables shippers to demand and re-

[44] The magnitude of the problem encountered by the shorter lines is exemplified by the similar situation at the Bethlehem mill at Bethlehem, Pennsylvania, where only 33% of the shipments that originate there terminate on the roads of the lines that serve the mill. (R.V.S. 58, p. 5 (Bethlehem Steel Corp.), App. 267.)

ceive the best possible service for their freight.[45] However, if the car service rules must be rigorously adhered to, there will be no incentive for carriers to compete by attempting to offer better services, for routes will be determined not by a shipper's preferences but by the fortuitous circumstance of the ownership of cars immediately available for loading.

Thus, the Commission's order will alter existing competition among carriers and shippers, and will create new competitive relationships by Commission fiat. Such a result is contrary to the Act, which was intended to prohibit all forms of discrimination within the reach of Congress. *See The Shreveport Case*, 234 U.S. 342, 356 (1914); *Merchants Warehouse Co.* v. *United States*, 283 U.S. 501, 512-13 (1931). *See also, Southern Pacific Co.* v. *United States*, 277 F. Supp. 671 (D. Neb. 1967), *aff'd per curiam*, 390 U.S. 744 (1968). Absent strong and clearly articulated justification, such action is impermissible. *Cf. American Trucking Ass'ns* v. *Atchison, T. & S.F. Ry.*, 387 U.S. 397 (1967).

In the present case, it is clear that the Commission's report contains no such justification. In fact, the Commission's report is devoid of any finding that specifically treats the competitive effects of its order. And the only indirect reference is a passing comment:

> "Although mandatory observance of these rules [1 and 2] may create shortages on roads which own insufficient equipment, . . . the needs of shippers affected should not be met with equipment of carriers

[45] Freedom to specify routes is important to shippers with changing market demands or stop-off points for fabrication, unloading or additional loadings. The Commission recognized these factors in *Pennsylvania R.R.—Merger—New York Central R.R., supra*, 327 I.C.C. at 511. Impairment of routing powers by car service rules of this nature also may infringe the shippers' common law right to redirect shipments in transit. *See Gulf, C. & S.F. R.R.* v. *Texas Packing Co.*, 244 U.S. 31 (1917).

which obtained the cars to serve other shippers." J.S. App. 66.

Surely this is not the adequate "consideration" contemplated by statute and decisional law. At best it recites an assumption of the Commission without analysis, without findings, and without even record evidence.[46] We submit, therefore, that the Commission's order must be invalidated, for, as this Court has held, if the findings of the Commission "do not provide [the] Court with a basis for determining whether the Commission's decision comports with the National Transportation Policy, that decision must be set aside. . . ." *Schaeffer Transportation Co.* v. *United States*, 355 U.S. 83, 92 (1957).

The substantive unreasonableness of the Commission's unworkable order stands in stark contrast to the other sensible and feasible alternatives available to the Commission. As the Government acknowledges (Govt. Br. 7-8), the Commission is acting on a number of related fronts with regard to car shortages. By the issuance of emergency car service orders under Section 1(15) of the Act, the Commission is dealing with specific shortages. An incentive per diem charge has been made applicable under certain circumstances,[47] and nothing prevents the

[46] Indeed, the Hearing Examiner commented on the lack of evidence in the record as follows:

> "These [car service] rules necessarily affect relations between and among rail carriers and their shippers, or with carriers using competitive modes of transportation. These relations would embrace one or more of the following subjects: per diem, economics, marketing, traffic, statistics, finance, accounting, export or import trades, and law. The witnesses for the Bureau of Operations claim no expertise or education in such fields of knowledge, and did not ask qualified personnel in the Commission to evaluate their proposals in order to discover whether they would produce sound or lawful results." H. Ex. 23, App. 29.

[47] *Chicago, B. & Q. R.R.* v. *New York, S. & W. R.R.*, 332 I.C.C. 176 (1968), *sustained on review sub nom., Union Pacific R.R.* v. *United States*, 300 F. Supp. 318 (D. Neb.) and *Boston and Maine R.R.* v. *United States*, 297 F. Supp. 615 (D. Mass.), *aff'd per curiam*, 396 U.S. 27 (1969).

Commission from further revising the per diem rates so as to make car ownership economically attractive. In addition, there are numerous pending legislative proposals for solving the car shortage problem that is said to exist. Thus, we submit, there is no need for the Commission to misuse distribution rules to attempt to force an increase in size of the car fleet, especially where the effort will not succeed and workable alternatives exist.

II.

THE COMMISSION'S ORDER DOES NOT MEET THE STANDARDS OF THE ADMINISTRATIVE PROCEDURE ACT.

The administrative proceeding that led to the order under review was a formal rule making proceeding. Thus, the Commission, as the proponent of mandatory observance of Car Service Rules 1 and 2, bore the burden of proof, and it was obligated to base its action on "substantial evidence" supported by "the whole record." 5 U.S.C. § 556 (1970). It was required, moreover, to make and set forth "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. § 557 (1970). Further, its conclusions must be rationally related to the bases upon which they purport to rest. *See, e.g., Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951); *Gray* v. *Powell*, 314 U.S. 402 (1941). Finally, because agency action cannot be sustained if it is "arbitrary [or] capricious," or is "unsupported by substantial evidence . . . reviewed on the . . . whole record," 5 U.S.C. § 706 (1970), this Court should consider *all* the evidence and determine whether it meets the test of substantiality—*i.e.*, "the kind of evidence on which responsible persons are accustomed to rely in serious affairs." *NLRB* v. *Remington Rand, Inc.*, 94 F.2d 862, 873 (2d

Cir.) (Learned Hand, J.), *cert. denied*, 304 U.S. 576 (1938).

The district court correctly found that the Commission's order, when so measured, was deficient in several significant respects. As we have shown *supra*, at 28-29, the Commission gave no consideration to the anti-competitive effects resulting from mandatory observance of the rules, or to the devastating financial effect that rigid enforcement of the rules will have on car-poor carriers. In addition, the Commission failed to elucidate how its order will alleviate car shortage problems. It did not afford any meaningful consideration to the injurious effects of the rules upon the shipping public. And, there is no discussion whatever with respect to the adequacy of the exceptions provision. In sum, the Commission's report is devoid of the essential findings and conclusions that the Administrative Procedure Act requires.

A. The Commission Failed To Make Findings Essential To Support Its Conclusion that Mandatory Observance of Car Service Rules 1 and 2 Will Alleviate Car Shortage Problems.

In its report, the Commission's sole conclusion is that

> "there is a continuing freight car shortage which requires affirmative, remedial action at this time. We believe that this situation results from a combination of an inadequate ownership of general purpose type freight cars . . . [by the nation's carriers] and improper utilization of the available freight car fleet." J.S. App. 87.

Clearly, then, "remedial action" must involve improving efficiency of utilization or increasing freight car ownership, or both. But the Commission's report does not include any finding that mandatory observance of Car Service Rules 1 and 2 will accomplish either objective.[48]

[48] Contrary to the Government's implied criticism (Govt. Br. 28, n. 23) of the district court's statement of surprise that "a seven-

The absence of such essential findings is, as the district court correctly held, fatal to the Commission's order. (J.S. App. 25.)

1. The Commission Did Not Find that Mandatory Observance of Car Service Rules 1 and 2 Will Increase Efficient Utilization of Freight Cars.

It is perfectly clear that absolute compliance with Car Service Rules 1 and 2 will not increase the efficient utilization of the freight car fleet. To the contrary, the Commission expressly conceded that mandatory observance of the rules is "not designed to improve the utilization of freight cars . . . ." (J.S. App. 65.) That concession is subject to the qualification: "except insofar as return loading is compatible with the primary objective of increasing availability of the cars to the owner." *Ibid.* Thus, to determine whether the order will improve utilization, one must evaluate the desirability of "increasing availability . . . to the owner." Accordingly, the district court quite properly looked for some Commission finding that car shortages are greater on the high-ownership lines (to which the cars would be returned) than on the car-poor lines (from which the cars are to be diverted). If car shortages are not more acute on the owner lines, then cars will be sent to roads that are not in greater need of them, with the result that car shortage problems will be aggravated rather than alleviated. It was in this context that the district court observed: "Although [the Commission] found a freight car short-

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year study . . . was climaxed by a spartan, one-sentence finding . . ." (J.S. App. 18), the district court did not restrict its review of the Commission's report to the section entitled "Findings." Rather, the court specifically stated:

> "Paucity of words in an agency's finding does not, of course, render it defective. It does require a reviewing court, however, to subject the report to careful examination in order to decide whether the decision met the appropirate tests." J.S. App. 18.

age that was 'all pervasive' throughout the United States, ostensibly on both owner and non-owner lines, the Commission did not find that the shortage was more acute on the owner lines." (J.S. App. 19.) Thus, the court below correctly concluded that the Commission's report was lacking a material finding of fact necessary to sustain its order.

2. The Commission Did Not Find that Mandatory Observance of Car Service Rules 1 and 2 Will Increase the Nation's Freight Car Supply.

The Commission's failure to find that mandatory observance of the car service rules will increase efficient utilization of the existing fleet might be excusable if the Commission had found that its order would alleviate car shortage problems by increasing car supply. But it did not make that finding either. As close as it came was to speculate that:

> "If a railroad has assurances that it can secure frequent and repeated loadings of its own cars, and if it is prohibited from indiscriminate use or misloading of someone else's cars, it will tend to correct any ownership deficiencies it may have." J.S. App. 66.

It is thus clear, and the Government concedes (Govt. Br. 28), that the responsibility for purchasing additional cars lies with the car-poor carriers. Indeed, it would be totally unrealistic to assume that the rules will stimulate high-ownership lines to purchase additional cars: not only do they, by definition, have enough cars, but if their cars are returned to them—whether they want them or not—they may well have excess cars on hand to meet the needs of shippers on their lines. But on the question whether car-poor carriers will in fact purchase additional cars, the Commission's report wholly lacks findings sufficient to support its order.

Whether or not, as the Government asserts (Govt. Br. 25), the Commission's order would place railroads "in a better position to judge their ownership needs . . ."[49] or would "provide an incentive for the railroads to purchase new equipment,"[50] there is no finding that car-poor carriers *will in fact* purchase additional cars. Nor could the Commission have made such a finding on the basis of the record in this case. For there is simply no evidence of the financial ability of *any* railroad, not only the car-poor lines, to purchase additional cars. Indeed, the Commission's main witness testified that he considered the economic impact to be irrelevant to the proceedings. (Tr. 2287-88, App. 120-21.)

Nonetheless, available information indicates that carriers could not respond to the Commission's prodding to

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[49] There is no finding or evidence to support a finding that railroads are not now able to evaluate their ownership needs. In any event, in this very proceeding the Commission promulgated a car ownership formula, whose purpose is to enable railroads to measure the adequacy of their freight car ownership. *See supra*, at 9, n.15.

[50] Again there is no finding or record evidence to support a finding that railroads need an incentive to purchase cars. The Government implies that such evidence exists when it argues that "the evidence established that an alarmingly low percentage of freight cars was on their owners' tracks at any given time and that this low percentage was a contributing factor to the freight car shortage." (Govt. Br. 24.) However, the Commission's chief witness, Robinson, testified unequivocally that the incidence of cars off line does not contribue to car shortage:

> "Dislocation of boxcars to the point where the vast majority are off owners' lines is not, of course, a *cause* of national car shortages, but rather a *result* of such conditions." V.S. 3, p. 110, App. 175 (emphasis supplied).

In any event, as the verified statement of Southern Pacific, cited by the Government (Govt. Br. 30), makes clear: "It is not the *incentive* which is in need of Commission stimulus, but the financial *ability* of the carriers." (V.S. 19, p. 37, App. 200 (emphasis in original)).

purchase additional cars. The Bureau of Enforcement admitted on brief that some roads do not have the financial capacity to acquire substantial additional rolling stock. (Bureau of Enforcement Br. 89, App. 338.) And, as the district court observed:

> "[I]n the same year that Division Three reversed the trial examiner, the I.C.C., in its Eighty-Third Annual Report, 1969, at 72, concluded that 'the general financial condition of railroads may be expected to remain poor, capital expenditures to remain minimal, and reduction in employment extended.'" J.S. App. 21.[51]

Although the basic findings which are indispensable to uphold agency action may "vary with the statutory authority invoked and the context of the situation presented," *Alabama G.S. R.R.* v. *United States*, 340 U.S. 216, 228 (1951), where, as here, the Commission seeks to alleviate a car shortage by requiring deficient carriers to purchase cars, common sense demands that the Commission find, on the basis of substantial evidence, that the car-poor carriers will be able to purchase additional freight cars. The court below correctly recognized the indispensability of such a finding. Thus, it stated that

> "a requirement for the owner railroad 'to increase its fleet' will, of necessity, produce substantial effects on the railroad industry and the shipping public. The record, however, is devoid of evidence which reflects the capacity of the railroad industry to absorb new freight car capital expenditures.
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> * * *
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> "It is elemental to require that a Commission report and order which may necessitate substantially increased capital expenditures in the railroad industry be buttressed with evidence disclosing the financial

[51] *See also supra*, at 26, n.42, for a more current statement by the Commission on this question.

status of the railroads which will be affected." J.S. App. 20-21.[52]

The requirement that an agency make appropriate findings is not imposed "to insist on formalities and to burden the administrative process with ritualistic requirements." *Yonkers* v. *United States*, 320 U.S. 685, 692 (1944). Rather, it rests upon a recognition that

> "the courts cannot exercise their duty of review unless they are advised of the considerations underlying the action under review . . . . [T]he orderly functioning of the process of review requires that the grounds upon which the administrative agency acted *be clearly disclosed and adequately sustained.*" *SEC* v. *Chenery Corp.*, 318 U.S. 80, 94 (1943) (emphasis supplied).

Whether or not the Commission could, on the record evidence, make findings sufficient to support its order, it is clear that it has not done so here.[53]

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[52] In an attempt to minimize the importance of a finding regarding the financial impact of the rules on railroads, the Government states that "a railroad encountering serious financial difficulty as a result of the operation of the car service rules may seek an exception from their imposition under Rule 19 . . . ." (Govt. Br. 30-31). However, there is no basis for the Government's erroneous assumption that an exception would be granted, not for a single car or a set of cars, but for a railroad's entire operation. Moreover, if an exception were granted under these circumstances, the Commission's order would make utterly no sense: the Commission's purpose in depriving car-poor carriers of the use of foreign cars was to compel those carriers to buy cars; if, however, such carriers are entitled to an exception, they will not be "compelled" to buy additional cars.

[53] This Court has held:

> "The Commission's action cannot be upheld merely because *findings might have been made and considerations disclosed* which would justify its order as an appropriate safeguard for the interests protected by the Act. There must be such a responsible finding." *SEC* v. *Chenery Corp.*, *supra*, 318 U.S. at 94 (emphasis supplied).

[Footnote continued on page 37]

This case is thus similar to *Palmer* v. *United States*, 75 F. Supp. 63 (D.D.C. 1947). In that case, the Commission sought to force prompt return of cars to their owners by including an element of penalty in the per diem charges. The Commission concluded that the increased per diem would promote efficiency of use and increase the supply of freight cars. That order was challenged on the grounds, *inter alia*, that the order was unsupported by and unrelated to the findings.

Responding to this challenge, the *Palmer* court carefully searched the report "to find the obviously requisite determinations" (*id.* at 75) which would support the operation of the Commission's order. The court then summarized the results of its search:

> "There is no finding that the public interest in the return of cars to the owning roads outweighs the public interest in the prompt movement of freight awaiting shipment at the initial unloading point of the car. There is no finding that an increase in the per diem would cause the return of a single car to its owner. There is no finding that in times of car shortage, the necessities of the non-owning railroads are less than those of the owning railroads . . . . There is no finding as to what freight needs immediate movement." *Id.*

The search for "the obviously requisite determinations" is as futile here as it was in *Palmer*.[54]

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[53] [Continued]

See also Burlington Truck Lines v. *United States*, *supra* 371 U.S. 156. Absent appropriate findings, the question of sufficiency of the evidence need not be reached. *Florida* v. *United States*, 282 U.S. 194, 215 (1931).

[54] The Government asserts that "[t]he *Palmer* holding was expressly overruled by Congress in enacting the 1966 amendment (80 Stat. 168) to 49 U.S.C. § 1(14)(a)." (Govt. Br. 29, n.24.) It is true that the 1966 amendment specifically empowered the Commission to establish incentive per diem charges, a power that the

Nor can the Commission excuse its failure to make necessary findings by relying upon its "expertise" in matters relating to the railroad industry. *Baltimore & Ohio R.R.* v. *Aberdeen & Rockfish R.R.*, 393 U.S. 87 (1968), teaches that administrative expertise is not a substitute for adequate findings. In that case, this Court, in affirming the lower court's holding that the Commission's order was not supported by substantial evidence and appropriate findings, stated:

> "if we were to reverse the District Court, we would in effect be saying that the expertise of the Commission is so great that when it says that average territorial costs fairly represent the costs of North-South traffic, the controversy is at an end, even though the record does not reveal what the nature of that North-South traffic is. The requirement for administrative decisions based on substantial evidence and reasoned findings—which alone make effective judicial review possible—would become lost in the haze of so-called expertise. Administrative expertise would then be on its way to becoming 'a monster which rules with no practical limits on its discretion.' *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 167. That is impermissible under the Administrative Procedure Act." *Id.* at 91-92.

Similarly, in the case at bar, the Commission cannot rely on its expertise to replace substantial evidence and reasoned findings. The absence of those findings requires, as the district court held, that the Commission's order be set aside.

Palmer court held the Commission did not have under the terms of the 1947 statutory language of Section 1(14). However, Congress' action in no way undermines the holding of *Palmer* that the Commission's action is unlawful because the findings in its report are not sufficient to support its order.

B. The Commission Failed To Give Meaningful Consideration to the Crippling Effects Its Order Will Have on the Shipping Public.

Despite the Government's attempt to imply that shippers approved of mandatory observance of Car Service Rules 1 and 2, the district court's summary of the record is unimpeachable. Thus, that court correctly observed that there was support for Bureau's recommendation "from an isolated sector of American industry, limited by product and geography," but that "the shipping public was generally opposed to the mandatory rules." (J.S. App. 21-22.) And so it was. As we have noted *supra* at 6, both the National Association of Shippers Advisory Boards and the National Industrial Traffic League unequivocally opposed prescription of mandatory observance of the rules and testified that such prescription would be injurious to the shipping public.

The uncontroverted evidence submitted by the appellee steel companies is illustrative of the factual basis from which these shippers' opinions were formed. Steelmaking is a "batch" process. Each of the processes to which the raw material is subjected—its chemical composition, heating, rolling, cooling, cutting and shaping—depends upon the requirements of a particular order. Thus, in general, manufacture and processing are carried on only in response to specific customer orders.[55] Typically, a customer orders several items, each involving multiple production processes. Since it is economical and efficient to ship the entire order at once, the production schedule of the mill

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[55] *See* R.V.S. 41, p. 7 (AISI), App. 251; R.V.S. 58, pp. 11, 16 (Bethlehem Steel Corp.), App. 269, 272; R.V.S. 69, p. 4 (Inland Steel Co.), App. 286; R.V.S. 77, p. 4 (National Steel Corp.), App. 306; R.V.S. 82, p. 5 (U.S. Steel Corp.), App. 310; R.V.S. 85, p. 4 (Wheeling Steel Corp.), App. 326.

is coordinated so that all items near completion at approximately the same time.[56]

Once production is completed, loading crews must assemble and prepare for immediate shipment all of the items comprising the order because storage and shipping space are at a premium.[57] In addition, customers generally do not order steel until they are ready to use it.[58] Therefore, there is considerable pressure on the producers to ship promptly. In fact, customers frequently place orders only with the mill that can assure delivery to suit their time limits.[59]

Because of the many contingencies in processing and quality control, it is impossible to forecast with accuracy the time that any particular shipment will be ready for loading.[60] It is thus impossible to order for loading cars of an ownership appropriate for any such shipment. Steel companies have responded to these uncertainties and pressures by maintaining maximum flexibility in the use of

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[56] *See* R.V.S. 44, pp. 10-11 (Armco Steel Corp.), App. 258; R.V.S. 58, p. 11 (Bethlehem Steel Corp.), App. 269; R.V.S. 82, p. 7 (U.S. Steel Corp.), App. 311.

[57] *See, e.g.*, R.V.S. 82, pp. 19-20 (U.S. Steel Corp.), App. 312-13; R.V.S. 86, pp. 6-7 (Youngstown Sheet & Tube Co.), App. 330.

[58] *See, e.g.*, R.V.S. 82, pp. 13, 17 (U.S. Steel Corp.), App. 311, 312.

[59] *See, e.g.*, R.V.S. 85, p. 5 (Wheeling Steel Corp.), App. 327; R.V.S. 86, p. 7 (Youngstown Sheet & Tube Co.), App. 330.

[60] Studies conducted by U.S. Steel in 1966 showed that during one week, where forecasts were made only 9 to 33 hours prior to a loading turn, 46% of the carloads scheduled were not loaded on the turn scheduled and 44% were not loaded on the day scheduled. R.V.S. 82, p. 22, Exhibit II, App. 314-16. *See also* R.V.S. 40, p. 5 (Allegheny-Ludlum Steel Corp.), App. 248; R.V.S. 41, p. 8 (AISI), App. 252; R.V.S. 69, p. 5 (Inland Steel Co.), App. 286-87; R.V.S. 70, p. 5 (J. & L. Steel Corp.), App. 292-93; R.V.S. 77, p. 4 (National Steel Corp.), App. 306; R.V.S. 82, pp. 5-7 (U.S. Steel Corp.), App. 310-11.

cars delivered to their plants.[61] Such flexibility would be eliminated if railroad practices, upon which steel companies relied in locating their mills and designing their production and shipping facilities,[62] were changed so that carriers were required to adhere absolutely to Car Service Rules 1 and 2. Briefly stated, the evidence submitted by these appellees, taken as a whole, established that, as a practical matter, the effect of the Commission's order would be to limit severely the ability of many steel plants to continue to produce and ship steel; in fact, in some instances, plants might well be forced to close.

The Commission's Bureau did not dispute this evidence. In fact, in its brief to the Commission, the Bureau acknowledged that mandatory observance of the rules would require additional switching; that many steel mills lack sufficient trackage to permit such additional switching and many cannot be expanded to provide such facilities; and that "[a]t many plants the routing requirements would to some extent affect efficiency of utilization of the car fleet." (Bureau of Enforcement Br. 89-90, App. 338-39.) Indeed, the Bureau recognized that several of the problems presented by the steel plaintiffs were "persuasive" and "particularly acute." (Bureau of Enforcement Br. 88, App. 338.)

The Hearing Examiner concluded that mandatory observance of the rules would have a disastrous effect on the steel industry. His findings, including those specifically acknowledging the impossibility of accurate forecasting and the inadequacy of switching facilities, have been set forth *supra*, at 8. These detailed findings should be contrasted with the finding of the Commission:

> "While observance of the rules may require some extra switching and short delays, this small incon-

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[61] *See, e.g.*, R.V.S. 44, pp. 10-11 (Armco Steel Corp.), App. 258; R.V.S. 58, p. 11 (Bethlehem Steel Corp.), App. 269.

[62] *See supra*, at 6-7.

venience and perhaps additional expense is a small price to pay for the overall benefits to be derived when originating lines obtain quick return of their system cars which were acquired to satisfy the needs of local shippers." J.S. App. 67.

If the Commission's statement is intended as a summary of the evidence of injury, it is, at the very least, uncandid.[63] The record is replete with substantial evidence that the shipping public will suffer significant and serious injury as a consequence of the Commission's order. Of course, that evidence might be overcome by substantial evidence that "the overall benefit to be derived" from the order will outweigh the injury. But there is no such evidence. Or, the convincing evidence of injury to the shipping public might be outweighed by evidence that the order will cause carriers to add freight cars to the fleet. But there is no evidence that the carriers will, or even that they can. There is, thus, no basis in the evidence to sustain the Commission's order.

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[63] As the district court correctly observed: "It is impossible to reconcile the divergent appraisal of [the] same data by the Commission and the Examiner." (J.S. App. 23, n.7) The Government argues that the district court "placed undue emphasis on the Hearing Examiner's recommended report" and that, in any event, "the Commission's report answers and refutes each of the Examiner's critical conclusions." (Govt. Br. 31.) But the only answer it can find in the Commission's report to the Examiner's finding with respect to the effects of mandatory observance of the rules is the statement regarding "extra switching and short delays" quoted in the text. Clearly this one sentence does not indicate that the "Commission exhaustively analyzed the evidence" (Govt. Br. 31); moreover, it does not meet even the minimal standard accepted by the Government—that the "findings of the Commission . . . 'reflect attentive consideration to the Examiner's decision.'" (Govt. Br. 33.)

C. The Commission Failed To Make Findings To Support the Adequacy of Its Exceptions Provision.

It is undisputed that perfect compliance with Car Service Rules 1 and 2 is not possible. Accordingly, because failure to comply may subject shippers and carriers to civil and criminal liability, it is essential that adequate provision for exceptions be made. Yet in the present case, the Commission has adopted a provision for granting exceptions which is not only manifestly inadequate and without procedural safeguards, but is completely without foundation in the record. Clearly, findings that the provision for exceptions is sufficient are required in this case, particularly since the Government here admits that, in order to sustain the reasonableness of the Commission's mandatory rules, there must be adequate exception provisions. (Govt. Br. 18, 36.)

1. Unless the Exceptions Provision Is Adequate, the Commission's Order Is Not Reasonable, Because It Is Impossible To Comply with.

In addition to the factors discussed in Part I of this brief, impossibility of compliance with a car service rule may make it unreasonable. In *Iversen* v. *United States*, 63 F. Supp. 1001 (D.D.C.), *aff'd per curiam*, 327 U.S. 767 (1946), the Commission issued a series of emergency orders under Section 1(15) of the Act drastically changing demurrage rules on refrigerator cars during the winter of 1945-46. The effect of the changes was to require the plaintiff to unload cars over the Christmas holiday weekend or pay a penalty demurrage. The plaintiff sought review of the order, urging that, since it had not been possible to unload the cars in question, the order must be held invalid. The court agreed, and finding that the plaintiff could not in fact have complied with the terms of the emergency order, set aside that part of the order with which compliance was impossible.

In the present case, the inability of shippers, including appellee steel companies, to comply with the order is ex-

tensively documented in the record.[64] This evidence was neither disputed nor discredited by Commission witnesses. Indeed at the hearing, the proponent of the Commission's order agreed that perfect compliance with the rules was impossible. (Tr. 1904, 3196, App. 116, 126.) The Hearing Examiner specifically focused on the problem, remarking that "all of the bureau witnesses agreed that perfect compliance with car service rules is impossible." (H. Ex. 24, App. 30.) And, as noted above, he made specific findings as to the impossibility of compliance by the steel industry.[65]

Thus, here, as in *Iversen*, shippers and carriers are unable to meet the requirements of the Commission's order and cannot avoid the penalty provision. In *Iversen*, the penalty was the payment of an excessive demurrage charge. In the present case, the penalty is the threat of prosecution and the imposition of criminal liability under the Elkins Act.[66] Because the rule cannot be complied

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[64] For example, during sample periods, Inland Steel Company found that only 33% of its shipments were loaded in compliance with the rules and that ideal conditions would have enabled only 36% more to be so loaded. (R.V.S. 69, p. 7, App. 288.) Bethlehem Steel's plant at Bethlehem, Pennsylvania loaded 48% in compliance with the rules, with a potential increase to 78% under ideal conditions. (R.V.S. 58, p. 14, App. 271.) Bethlehem Steel's Burns Harbor plant showed 41% presently and 65% possible. (R.V.S. 58, p. 18, App. 274.) And U.S. Steel showed a theoretical compliance of 38-75% at various of its mills. (R.V.S. 83, pp. 7-8, Exhibit 1, App. 319-21.)

[65] *See supra*, at 8.

[66] 49 U.S.C. § 41(1) (1970). An additional problem arises because there is no way for a shipper or carrier to know in advance whether tendering or accepting for shipment a car not loaded in compliance with the rules will subject him to possible criminal liability. During the hearing, the Bureau of Enforcement stated that it would tolerate 80 percent compliance on the part of carriers if there is "a general good-faith attempt to comply with the rule." (Tr. 1572, App. 107.) The Hearing Examiner, reciting the opinion of a Commission witness that "the proposed car service rules should be administered with 'strictly controlled flexibility,'" stated "the

with, it should not be held to be a "reasonable" rule within the meaning of Section 1(14)(a), unless the exceptions provided by the Commission are adequate.

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latter concept may beguile the imagination but it does not provide a comprehensive standard of enforcement." (H. Ex. 24, App. 30.) The district court agreed with this characterization. (J.S. App. 24-25.)

The absence of an ascertainable standard of conduct is highlighted by the Government's brief to this Court, where it states: "In most instances, it is anticipated that the railroads will *either* make a good faith effort to comply with the rules *or* apply for an exception where compliance appears to be impossible or unduly burdensome." (Govt. Br. 35, emphasis supplied.) It is thus not clear whether a shipper or carrier must apply for an exception or whether a "good faith effort" will suffice in lieu thereof. The Government seeks to avoid the difficulties inherent in this uncertainty by arguing that "criminal penalties would still be dependent upon a showing of criminal intent . . . ." (Govt. Br. 35.) However, the Elkins Act does not require specific intent as an element of the crime, but applies the less stringent statutory intent standard—the party charged is guilty if he purposely does an act prohibited by statute, even though the act does not involve turpitude or moral wrong and the party does not intend to violate the law. *Armour Packing Co.* v. *United States*, 209 U.S. 56, 85 (1908). *See also, Union Pacific R.R.* v. *United States*, 313 U.S. 450, *rehearing denied*, 314 U.S. 707 (1941).

Under these circumstances, the Commission has not provided meaningful standards of conduct consistent with the recognition of all parties that compliance with Car Service Rules 1 and 2 is not possible. Such a failure to provide clear standards for the application of criminal statutes is a defect of constitutional proportions. *See, e.g., United States* v. *Cohen Grocery Co.*, 255 U.S. 81 (1921). This Court, like the district court, need not reach this constitutional issue if it affirms the district court's holding that the Commission's order is unreasonable either under Section 1(14)(a) or the Administrative Procedure Act.

2. The Commission Did Not Make the Necessary Finding that the Exceptions Provision in Its Order Is Adequate.

The exceptions provision can best be described as an afterthought. In its initial report prescribing Car Service Rules 1 and 2 for mandatory observance, the Commission did not provide for exceptions. It was only after appellees filed petitions for reconsideration that the Commission added Rule 19, which provides for exceptions.[67] However, no hearings were held between the issuance of the initial report and the adoption of Rule 19, nor did the order adding Rule 19 to the Commission's previous order recite any findings, let alone evidence upon which findings could be based, establishing the adequacy of the exceptions mechanism.

The failure of the Commission to obtain evidence and make reasoned findings with respect to the adequacy of its exceptions provision is significant for two reasons. First, as discussed above, if the exceptions provision is not adequate, mandatory observance of Car Service Rules 1 and 2 is not a "reasonable" order. Second, there is substantial evidence in the record which indicates that the Commission's exceptions provision is inadequate.

The need for deviation from the rules follows no predictable pattern, but arises on a day-to-day and hour-to-hour basis. Appendix B to the Bureau's brief filed with the Commission shows that average daily loadings of plain boxcars were 39,782 in 1964, or over 10 million during the entire year. If, as Commission witnesses ac-

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[67] Rule 19 provides as follows:

"Rule 19—Exceptions. Exceptions to the rules (prescribed by the Interstate Commerce Commission for mandatory observance) for the purpose of further improving car supply and utilization, increasing availability of cars to their owners, improving the efficiency of railroad operations, or aleviating inequities or hardships, may be authorized by the Director or Assistant Director of the Bureau of Operations, Interstate Commerce Commission, Washington, D. C." J.S. App. 172.

knowledge, carriers and shippers can achieve only 80% compliance with the mandatory rules (Tr. 1570, App. 106), the Commission's order would produce over 2 million requests for exceptions each year, or nearly 40,000 requests each week. The size of an administrative apparatus adequate to handle this deluge would be staggering. And even if the Bureau of Operations were adequately staffed to receive and process all these requests, it is questionable whether the requests could be granted as promptly as would be necessary to satisfy the needs of the shipping public.[68]

In its brief before this Court, the Government does not assert that there is evidence of record to support any finding as to the adequacy of the Commission's exception provision. (Govt. Br. 34-35.) Rather it relies solely on a statement taken out of context from the AAR's Petition for Reconsideration.[69] Significantly, the Government failed to include the AAR's statement in the same document that:

> "This is not to suggest that the railroads invite the imposition of mandatory car service rules or the suggested exception arrangement as an improvement

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[68] Indeed, the Hearing Examner criticized a Bureau proposal for exceptions similar in effect to Rule 19 as "inflexible" and "dilatory" and concluded that the suggested exception provision "could frustrate effective action by railroad operating officials." H. Ex. 40-41, App. 47-48.

[69] The statement quoted by the Government is as follows:

> "There is only one feasible way to operate the railroads under a mandatory system of car service rules. The Chairman of the AAR Car Service Division must be allowed to grant exceptions to the rules whenever literal compliance would be detrimental to or frustrate the objectives of the rules, with the possible proviso that, should the Commission desire to retain overall supervision of such procedure, all exceptions granted shall be filed with the Commission by the Chairman and be subject to suspension or cancellation. Specifically, the railroad respondents request that . . . the following provision must also be prescribed as an integral part of the same set of regulations . . . ." AAR Petition for Reconsideration, p. 89, App. 340.

over present conditions. Quite to the contrary—it is our view that even the foregoing exception proposal would be cumbersome, burdensome, and expensive, and of unproven benefit to the railroad industry and to the shippers as a whole. However, such a procedure, cumbersome or burdensome though it may be, is far preferable to the alternative—mandatory rules which are impossible to fully comply with and no provision for exceptions." AAR Petition for Reconsideration, p. 92, App. 342.

Thus the only support offered by the Government to sustain the adequacy of the exceptions provision proves quite the contrary when placed in its proper context.

Finally, the granting of exceptions is left to the unfettered caprice of a Commission employee. There are no stated procedural standards to govern the exercise of this vast power. There is no requirement of a hearing or of making findings—or even that the grant or denial of exceptions be made public. Thus, the Commission's life-and-death power to relieve a shipper or carrier from rules with which compliance is admittedly impossible is not hedged with a single safeguard. Plainly, such a provision is unreasonable.

CONCLUSION

Appellees have shown that the Commission's order is not "reasonable" within the meaning of Section 1(14)(a) of the Act and that the Commission's report fails to satisfy the requirements of the Administrative Procedure Act for valid agency action. Accordingly, the decision of the court below should be affirmed.

It is important to recognize that affirmance of the district court will not in any way hamper the Commission in its efforts to remedy any car shortage problem it finds in this or in other agency proceedings. The record in this proceeding is still open (J.S. App. 88), and the Commis-

sion may at any time reconsider the evidence now before it and make such findings to support its order as that evidence will permit; or it may receive additional evidence where necessary. Affirmance would neither prevent the Commission from further revising the per diem rates so as to make car ownership attractive, nor interfere with its continuing program of dealing with car shortages by means of emergency orders under Section 1(15) of the Act.

For the reasons stated, the judgment of the district court should be affirmed.

Respectfully submitted,

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February 14, 1972

APPENDIX

APPENDIX

1. Section 1(21) of the Interstate Commerce Act, 41 Stat. 478, as amended, 49 U.S.C. § 1(21) (1970) provides:

> "The Commission may, after hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to this chapter, party to such proceeding, to provide itself with safe and adequate facilities for performing as a common carrier its car service as that term is used in this chapter, and to extend its line or lines: *Provided*, That no such authorization or order shall be made unless the Commission finds, as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier subject to this chapter which refuses or neglects to comply with any order of the Commission made in pursuance of this paragraph shall be liable to a penalty of $100 for each day during which such refusal or neglect continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States."

2. National Transportation Policy, 54 Stat. 899, 49 U.S.C. preceding § 1 provides:

> "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of

reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

3. Section 7 of the Administrative Procedure Act, 5 U.S.C. § 556 (1970), provides in pertinent part:

"(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form."

4. Section 8 of the Administrative Procedure Act, 5 U.S.C. § 557 (1970) provides in pertinent part:

> "(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—
>
> (1) proposed findings and conclusions; or
>
> (2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and
>
> (3) supporting reasons for the exceptions or proposed findings or conclusions.
>
> The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—
>
> (A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and
>
> (B) the appropriate rule, order, sanction, relief, or denial thereof."

5. Section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 706 (1970) provides:

> "To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) Without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error."

SUPREME COURT, U. S.

FILED

MAR 17 1972

[illegible] ROOM, JR., CL

No. 71-227

In the Supreme Court of the United States.

OCTOBER TERM, 1971.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

ALLEGHENY-LUDLUM STEEL CORPORATION ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

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In the Supreme Court of the United States

OCTOBER TERM, 1971

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BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The opinion of the district court (J.S. App. 13–26) is reported at 325 F. Supp. 352. The report of the Interstate Commerce Commission (J.S. App. 28–168) is reported at 335 I.C.C. 264. The Commission's order of February 18, 1970 (J.S. App. 169–179) is reported at 335 I.C.C. 874, and its order of March 18, 1970 (J.S. App. 180–183) is unreported.

JURISDICTION

The judgment of the district court was entered on March 18, 1971 (J.S. App. 27). Notices of appeal

were filed by the United States and the Interstate Commerce Commission on May 17, 1971 (J.S. App. 204–207). On July 9, 1971, Mr. Justice Brennan extended the time for docketing the appeal to August 15, 1971. The appeal was docketed on August 13, 1971. Probable jurisdiction was noted by the Court on November 9, 1971 (App. 1). The jurisdiction of this Court rests on 28 U.S.C 1253.

QUESTIONS PRESENTED

Whether the district court erred in enjoining the enforcement of certain car service rules promulgated by the Interstate Commerce Commission, which generally require that off-line freight cars be returned either loaded or empty in the direction of the railroads that own them so as to increase the availability of freight cars to their owners.

This involves the following subsidiary questions:

1. Whether the court below erred in holding that the general and pervasive shortage of freight cars on virtually all railroads is an insufficient basis for the imposition of the car service rules, in the absence of explicit findings of shortages on individual railroads, and of the financial ability of affected railroads to increase their car supply.

2. Whether the court below erred in holding that the practical necessity, recognized and provided for by the Commission, for some exceptions in the day-to-day administration of the car service rules renders the rules invalid.

STATUTE INVOLVED

Section 1(14)(a) of the Interstate Commerce Act, 40 Stat. 101, as amended, 49 U.S.C. 1(14)(a), provides:

> The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this part, including the compensation to be paid and other terms of any contract, agreement, or arrangement for the use of any locomotive, car, or other vehicle not owned by the carrier using it (and whether or not owned by another carrier), and the penalties or other sanctions for non-observance of such rules, regulations, or practices. In fixing such compensation to be paid for the use of any type of freight car, the Commission shall give consideration to the national level of ownership of such type of freight car and to other factors affecting the adequacy of the national freight car supply, and shall, on the basis of such consideration, determine whether compensation should be computed solely on the basis of elements of ownership expense involved in owning and maintaining such type of freight car, including a fair return on value, or whether such compensation should be increased by such incentive element or elements of compensation as in the Commission's judgment will provide just and reasonable com-

pensation to freight car owners, contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense. The Commission shall not make any incentive element applicable to any type of freight car the supply of which the Commission finds to be adequate and may exempt from the compensation to be paid by any group of carriers such incentive element or elements if the Commission finds it to be in the national interest.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court (J.S. App. 27) invalidating portions of certain orders issued by the Interstate Commerce Commission as part of its broad effort to meet the problems of freight car supply and distribution on the nation's railroads. The Commission orders here in issue (J.S. App. 167–168, 169–179, 180–183) make mandatory the observance of various rules selected from the "Code of Car Service Rules" (J.S. App. 128–145) published by appellee Association of American Railroads ("AAR") for observance by almost all railroads (App. 259). The district court enjoined the Commission from enforcing two of the rules so selected, which, in essence, would require that empty freight cars be returned, either with or without load, in the direction of the railroads owning the cars.

A. Background

For more than a century, the nation's railroads have freely interchanged loaded freight cars so that goods could be shipped from point of origin to point of destination over two or more railroads in a single freight car. Under this system, each railroad participating in the transportation receives a portion of the freight charge; in addition, a railroad hauling a freight car it does not own pays the owner a daily rental charge ("per diem") for the period the car is on the non-owner's tracks (App. 189). To provide for the return of cars to their owners after freight is unloaded, railroads as early as 1902 voluntarily adopted a "Code of Car Service Rules."[1] Substantially the same rules are now part of the AAR Car Service and Per Diem Agreement, to which virtually all railroads have become parties (App. 259).

Notwithstanding the railroads' covenants to "abide by and enforce the rules" (*ibid.*), many railroads have simply disregarded the car service rules (App. 157–159, 182),[2] particularly in times of general freight car shortage, with the result that in recent years railroads frequently received the use of their own cars on the average of less than once each month (App. 159–162, 182). The Commission has thus found it nec-

[1] See *Rule Book of the American Railway Association*, 19, 195–197 (1905).

[2] For a short period during World War I, the car service rules governing the return of freight cars were made mandatory by the Commission as to certain types of cars. See *Car Supply Investigation*, 42 I.C.C. 657; J.S. App. 61. See also pp. 19–21, *infra*.

essary periodically to issue special orders to individual carriers with respect to the return of freight cars to their owners (App. 151).

Shortly after the second World War, the Commission conducted a general investigation of freight car service and concluded that railroads as a group had failed to furnish adequate car service by not acquiring ownership of a sufficient number of general purpose freight cars to meet the needs of the shipping public. *Car Service, Freight Cars,* 268 I.C.C. 687. At that time however, it declined to impose mandatory car service rules in the belief that the problems could best be solved by leaving the matter to railroad management and that an equitable distribution of cars might be obtained through the carriers' voluntary compliance with the AAR Rules (J.S. App. 33–34).

By the 1960's it became apparent that, far from improving, the car shortage problem was in fact worsening. Between 1955 and 1964, the total number of freight cars owned by railroads in the United States declined by some 210,000, or more than 12 percent (App. 151–155). The decline in ownership of general purpose boxcars—the workhorses of the nation's car fleet—was even more precipitous, falling more than 22 percent during that 10-year period (*ibid.*). This decline in the number of cars was only partially offset by a corresponding increase in the size or capacity of the cars in use; during the same period the aggregate capacity of freight-carrying cars declined by approximately 5 percent (*ibid.*). The problem of re-

curring car shortage became the subject of congressional hearings[3] and a matter of presidential concern.[4]

In an effort to alleviate the crisis, the Commission moved upon a number of related fronts, establishing a new schedule of payment for the use by one railroad of another's cars (basic per diem);[5] adding an "incentive" element to the basic per diem charge to encourage the prompt return of equipment found to be in short supply;[6] enforcing the requirement that there be complete unloading of boxcars, free of debris and damage, to permit more prompt reuse of the

[3] See Hearings Before a Subcommittee of the Senate Committee on Commerce on S. 886, 87th Cong., 1st Sess.; Hearings Before a Subcommittee of the Senate Committee on Commerce on S. 1063, 88th Cong., 1st Sess.; Hearings Before the Freight Car Shortage Subcommittee of the Senate Committee on Commerce, 89th Cong., 1st Sess.; Hearings Before the House Committee on Interstate and Foreign Commerce on H.R. 2230, H.R. 7165, and S. 1098, 89th Cong., 1st Sess.; Hearings Before a Subcommittee of the Senate Committee on Commerce on Freight Car Supply, 91st Cong., 1st Sess.

[4] See President Johnson's remarks upon signing P.L. 89-430, May 26, 1966, published in 2 *Weekly Compilation of Presidential Documents*, p. 690.

[5] *Chicago, B. & Q. R. Co.* v. *New York, S. & W. R. Co.*, 332 I.C.C. 176, sustained on review *sub nom. Union Pacific R. Co.* v. *United States*, 300 F. Supp. 318 (D. Neb.), and *Boston and Maine Railroad* v. *United States*, 297 F. Supp. 615 (D. Mass.), affirmed *per curiam*, 396 U.S. 27.

[6] *Incentive Per Diem Charges—1968*, 337 I.C.C. 183 and 217, sustained on review *sub nom. Long Island R. Co.* v. *United States*, 318 F. Supp. 490 (E.D.N.Y.), and reversed and remanded in *Florida East Coast Ry. Co.* v. *United States*, 322 F. Supp. 725 (M.D. Fla.), appeal pending in this Court, No. 70-279.

cars;[7] and increasing the use of its emergency power to remedy critical equipment shortages.[8] In addition, the Commission has further endorsed proposed legislation to establish a federally chartered, quasi-public corporation to acquire general purpose freight cars and make them available to the nation's railroads; bills have been introduced and hearings held,[9] but no final action has yet been taken by Congress. It was in this context that the proceeding which culminated in the promulgation of the instant rules arose.

B. Proceedings Before the Commission

1. In December 1963, the Commission instituted an investigation into the adequacy of freight car ownership. In June 1964, the Commission issued an interim report finding a substantial inadequacy of ownership in more than one category of freight cars throughout the United States. *Investigation of Adequacy of Railroad Freight Car Ownership, Car Utilization, Distribution, Rules and Practices,* 323 I.C.C. 48, 60. The following month, the Commission issued a formal notice of proposed rulemaking pursuant to Section 1(14)(a) of the Interstate Commerce Act, broadening the earlier proceeding to consider the possible prescription of rules to alleviate recurring freight car short-

[7] *Consignee's Obligation to Unload Rail Cars in Compliance With Carriers' Published Tariffs* (Docket No. 35237, decided Feb. 18, 1970), review pending *sub nom. A. E. Staley Mfg. Co.* v. *United States* (C.A. No. 4-69 Civ. 459; D. Minn.).

[8] See, *e.g.*, *United States* v. *Southern Ry. Co.*, 364 F. 2d 86 (C.A. 5), certiorari denied, 386 U.S. 1031.

[9] Hearings Before the Special Subcommittee on Freight Car Shortage of the Senate Committee on Commerce on S. 1415, S. 1729, S. 1730 and S. 1731, 92d Cong., 1st Sess.

ages. 29 Fed. Reg. 11653. Preliminary information was solicited by means of a detailed questionnaire sent to all Class I railroads and to certain Class II railroads and switching and terminal companies.[10]

The proceeding was then assigned to a hearing examiner for the taking of testimony. The views of 121 witnesses were filed in the form of verified statements. In addition, certain of the affiants were cross-examined during 50 days of oral hearings, which generated nearly 6,000 pages of transcript.

To establish that there was indeed a national freight car shortage, the Commission's Bureau of Accounts introduced a verified statement based on the data for the month of October 1964 supplied by the railroads in response to the questionnaire (App. 183–184). Analyzing the data, the Bureau concluded that there was a national freight car deficiency of 111,042 cars, or 7.66 percent of the railroads' total car ownership. Many of the railroads and practically all of the shippers attested to, or at least assumed, the existence of a chronic shortage of freight cars.[11]

To help alleviate the shortage of freight cars, the Commission's Bureau of Operations urged the Com-

[10] Class I railroads are those with annual operating revenues of $5,000,000 or more; Class II railroads are those with annual revenues of less than $5,000,000. 49 C.F.R. 1240.1.

[11] For statements of railroads, see 194–195; 199–200; 221; 231; 237–238; and 241. For statements of shippers or their representatives (including some of the appellee steel companies), see App. 202; 203–204; 205; 207–208; 211; 246; 249; 267–268; 279; 280; 281; 282–284; 285; 291; 295; 301; 305; 325; and 328–329.

mission to make mandatory the observance of certain of the car service rules promulgated by the railroad industry (App. 173–181). Witnesses for some railroads also conceded that enforceable car service rules were needed. For example, a witness for the Great Northern advocated "strong measures" to combat the shortage of freight cars, including "stricter enforcement of and compliance with car service rules" (App. 190). Similarly, witnesses for the Northern Pacific and the Pennsylvania Railroad testified that the supply and utilization of freight cars could be improved through compliance with the car service rules (App. 194–195, 198).[12]

A number of shippers and their representatives expressed similar views. The American Plywood Association, for example, proposed a rule to achieve return of cars "in accordance with the present AAR car service rules", and expressed the view that the position of the industry would improve if the AAR rules were made mandatory (App. 205–206; 144–145). And a witness for the National Industrial Traffic League, while opposing the imposition of mandatory rules, admitted on cross-examination that "[i]f the carriers followed their own rules I imagine there would be less shortages in certain areas of the country than we have experienced" (App. 149).[13]

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[12] See, also, verified statements of the witnesses for the Chesapeake & Ohio Railway (App. 188–189), the Missouri Pacific (App. 192), the Boston & Maine (App. 218–219), and the New York, New Haven and Hartford Railroad (App. 234).

[13] See, also, verified statements of the Secretary of Agriculture (App. 309; 134) and of the witnesses for the Public Utility Commissioner of Oregon (App. 210; 308), the Western Wood Products Association (App. 237–238; 142–143), and the Vulcan Material Company (App. 212–215; 322–324).

Opposition to the mandatory enforcement of car service rules was expressed by the AAR and several shippers (including certain steel companies) on the grounds, *inter alia*, that increased empty car mileage and severe restrictions on loading operations would result.[14]

In January 1968, the hearing examiner filed a report and order recommending discontinuance of the proceeding and finding the statistical data on freight car ownership to be unreliable and in some instances biased (App. 24–27). The examiner further concluded that mandatory enforcement of the proposed car service rules would place undue and inflexible restraints on railroad management, and would be detrimental to efficient freight car distribution (App. 46–49).

2. In a report and order issued in August 1969, Division 3 of the Commission rejected the conclusions of the hearing examiner and order that certain of the proposed car service rules and a formula for determining the adequacy of future freight car ownership be put into effect.

The Commission analyzed in detail the data submitted by the railroads in the course of the proceeding and other data contained in periodic reports by the railroads to the Commission and to the AAR

[14] See, *e.g.*, App. 248; 250; 259–260; 268; 291; and 305.

covering the decade 1955–1964 (J.S. App. 35–53). On the basis of this analysis, the Commission found that freight car shortages of varying duration and severity have repeatedly occurred, both at times of national emergency and during yearly peak loading periods (J.S. App. 35). This evidence, the Commission concluded, showed that the railroads had failed to maintain an adequate freight car supply (J.S. App. 52–53).

The Commission also noted the low percentage of freight cars that were actually on the tracks of their owners at any given time, and observed that the percentage had been gradually decreasing in recent years (J.S. App. 54). Thus, for example, on March 1, 1966, only 27.7 percent of the nation's plain boxcars were on their owners' lines; in the preceding year, the percentage had remained mostly in the low thirties (*ibid.*). Because of the low percentage of cars on their owners' lines, the Commission found that the railroads had little incentive to purchase large fleets of cars or maintain their cars to high standards; apart from per diem income, the principal beneficiaries of such practices would be other lines (J.S. App. 55). The Commission concluded that this dislocation of cars contributes to the steadily decreasing supply of freight cars in general service—cars on which the public heavily relies (J.S. App. 55–56).

Of the several AAR car service rules selected by the Commission for mandatory observance, only the

first two are in issue here.[15] In adopting these two rules, which generally require that empty freight cars be returned, with or without a load, in the direction of the owner lines, the Commission noted that it was not attempting to improve the general utilization of freight cars, but was primarily interested in increasing the availability of cars to their owners (J.S. App. 65).

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[15] The two rules provide (J.S. App. 64):

Rule 1:

Foreign cars, empty at a junction with the home road, must be:

a. loaded at that junction to or via home rails, or,

b. delivered empty at that junction to home road, except in instances where Rule 6 [see J.S. App. 67–88] has been invoked, or unless otherwise agreed by roads involved.

Rule 2:

Foreign empty cars other than those covered in Rule 1 shall be:

a. loaded to or via owner's rails.

b. loaded to a destination closer to owner's rails than is the loading station or delivered empty to a short line or switch loading road for such loading (Car Selection Chart is designed to aid in so selecting cars for loading).

c. delivered empty to the home road at any junction subject to Rule 6.

d. delivered empty to the road from which originally received under load, at the junction where received, EXCEPT, that when handled in road haul service, cars of direct connection ownership may not be delivered empty to a road which does not have a direct connection with the car owner.

e. return to the delivering road when handled only in switching service.

Assured of greater use of their cars, the Commission reasoned, owners would then be in a better position both to acquire freight cars to meet the specific needs of their shippers and to measure more accurately their ownership requirements (*ibid.*). Moreover, enforcement of the rules would shift the responsibility for freight car shortages to the railroads with inadequate ownership, forcing such railroads to purchase new cars (*ibid.*). The Commission recognized that mandatory observance of the rules might create temporary shortages on the lines owning insufficient equipment, but concluded that the needs of the shippers affected should not be met with freight cars purchased by other railroads to serve other shippers (J.S. App. 66).

Rejecting arguments in opposition to the proposed rules, the Commission found that empty car miles will be reduced in the long run if cars are used in accordance with the rules and that the extra switching and short delays which observance of the rules might cause were outweighed by the benefits which would accrue from the quick return of cars to their owners (J.S. App. 67).

A Note to Rules 1 and 2, as adopted by Division 3 of the Commission, provided that any inequities arising in the application of the rules should be resolved by negotiations between the railroads involved. Following agreement by the parties and concurrence by the Car Service Division of the AAR, exceptions to the rules would be permitted (J.S. App. 65). Upon

petitions for reconsideration, the full Commission promulgated an additional rule—Rule 19—empowering the Director or Assistant Director of the Commission's Bureau of Operations to grant exceptions to the car service rules prescribed for mandatory observance (J.S. App. 172).

C. Decision of the Court Below

The district court enjoined enforcement of Car Service Rules 1 and 2,[16] finding three deficiencies in the Commission's report. First, although conceding that there may be substantial evidence of a nationwide freight car shortage, the district court found that the evidence does not support a finding that there are special freight car shortages on railroads owning relatively large numbers of cars (J.S. App. 19–20). The court also criticized the Commission for failing to make express findings with respect to the financial ability of railroads owning relatively few freight cars and of the shipping public to absorb new freight car capital expenditures (J.S. App. 20–23, 25). Finally, the court noted that it was conceded that there could not be complete observance of the mandatory rules and that violation of the rules could result in the imposition of criminal penalties. Since, in the court's view, the imposition of the penalties could be dependent upon a

[16] The district court's injunction (J.S. App. 27) did not affect the other car service rules selected for mandatory observance or the formula prescribed by the Commission for measuring the adequacy of freight car ownership in the future.

determination by a field representative of whether an exception to the rules should be granted, the court found that those subject to the rules were deprived of an ascertainable standard for determining the legality of their conduct (J.S. App. 25).

D. The Decision of the United States District Court for the Middle District of Florida

On June 7, 1971, after the court below had decided the present case, another three-judge district court sitting in Florida upheld the Commission's promulgation of Car Service Rules 1 and 2, expressly refusing to follow the decision here. *Florida East Coast Railway Company* v. *United States,* 327 F. Supp. 1076 (M.D. Fla.), reprinted at J.S. App. 184–203.

SUMMARY OF ARGUMENT

1. Section 1(14)(a) of the Interstate Commerce Act, 49 U.S.C. 1(14)(a), which empowers the Commission to promulgate reasonable car service rules, was enacted in 1917 during a period of extreme freight car shortage. At that time, as now, the railroad industry had adopted car service rules governing the return of freight cars to their owners; as is also the case now, these rules were frequently ignored by the railroads. The legislative history of Section 1(14)(a) disclosures that Congress recognized that enforcement of the railroads' own car service rules would help alleviate the car shortage and fully intended, in enacting the statute, to authorize the Commission to prescribe such rules as it found appropriate for manda-

tory observance. It is in the light of this history that the "reasonable rules" standard enacted by Congress should be interpreted.

In arguing that the rules promulgated by the Commission here were indeed "reasonable", we begin with the Commission's finding that a national freight car shortage exists. Given the shortage, the Commission focused on the fact that due to the non-observance of AAR Car Service Rules 1 and 2, railroads received very little use of their own cars. The Commission concluded that enforcement of the rules would give the railroads greater use of their cars and provide an incentive for them to purchase new equipment. Proper consideration was also given to the extra switching and short delays which might result from the enforcement of the rules. The Commission was supported in its conclusion that enforcement of the car service rules was appropriate both by testimony in these proceedings and by testimony before congressional committees investigating the freight car shortage. In all the circumstances, we submit, the Commission's decision to prescribe AAR Car Service Rules 1 and 2 for mandatory observance was eminently reasonable.

2. Since the primary purpose of the Commission's orders is to increase the *supply* of freight cars, it was not necessary for the Commission specifically to find that there was a freight car shortage on railroads owning relatively large numbers of freight cars. Once the Commission determined the existence of a national shortage, it was appropriate to prescribe rules which would provide an incentive for new car purchases and

would focus the responsibility for such purchases on roads with deficient ownership of cars. Similarly, specific findings on the financial ability of railroads to purchase new equipment were not necessary. Aware of their ownership needs, railroads will be able better to justify the necessary expenditures; to the extent that compliance with the rules imposes undue financial hardship, the roads affected may apply for exceptions.

3. Finally, the fact that total compliance with the car service rules may not be possible does not foreclose the Commission from requiring mandatory observance of the rules where, as here, adequate provision is made for granting exceptions. The district court erred in concluding that criminal penalties attach to every non-excused failure to comply; proof of criminal intent continues to be a necessary element of a criminal violation.

ARGUMENT

I. THE PROMULGATION BY THE COMMISSION OF AAR CAR SERVICE RULES 1 AND 2 FOR MANDATORY OBSERVANCE WAS "REASONABLE" WITHIN THE MEANING OF SECTION 1(14)(A) OF THE INTERSTATE COMMERCE ACT

A. IN AUTHORIZING THE COMMISSION TO ESTABLISH "REASONABLE" CAR SERVICE RULES, CONGRESS ANTICIPATED THAT THE COMMISSION MIGHT FROM TIME TO TIME ADOPT CERTAIN OF THE RAIL INDUSTRY'S OWN RULES FOR MANDATORY OBSERVANCE

Section 1(14)(a) of the Interstate Commerce Act, 49 U.S.C. 1(14)(a), known also as the Esch Car Service Act of 1917, expressly authorizes the Commission to "establish reasonable rules, regulations, and practices with respect to car service" by the rail carriers.

As the legislative history of the Esch Act makes plain, one of Congress' basic purposes was to authorize the Commission to enforce, where appropriate, the existing car service rules voluntarily adopted but frequently ignored by the railroad industry. That is precisely what the Commission has done here. The district court's holding that, even though a national freight car shortage may in fact exist, the Commission's action in this case did not meet the standards of the Act, significantly narrows the scope of the Commission's discretion to prescribe car service rules and is contrary to the broad statutory mandate embodied in the Esch Act's "reasonable rules" standard.

Enactment of the Esch Act was prompted by the severe car shortage which plagued the nation during World War I. In 1916, complaints from all parts of the country were reaching the Commission, as shippers and carriers alike struggled to meet the demands for freight cars with an inadequate car fleet. The Commission initially sought to remedy the problem by appealing to the railroads themselves for voluntary cooperation, particularly with regard to the observance of their own existing car service rules.[17] When no immediate improvement materialized, the Commission one month later instituted a formal in-

[17] See letter, dated October 13, 1916, from the Chairman of the Commission to the President of the American Railway Association (predecessor of the AAR), circulated to all member railroads as Circular No. 1736, the American Railway Association. A copy of the Circular is on file at the library of the Commission.

vestigation into the problem of car supply. *Car Supply Investigation,* 42 I.C.C. 657. After receiving evidence, the Commission issued a report finding (42 I.C.C. at 662):

> For present purposes it is sufficient to state that for some time prior to the Commission's investigation there had been a general misuse of freight cars by substantially all of the respondent carriers. The substance of these misuses was the failure to observe the then effective car service rules 1, 2, 3, and 4, which provide for the return of cars to the owning roads, stated in Exhibit A of the appendix, adopted by the American Railway Association [predecessor of the AAR], whose members include all of the principal carriers of the United States subject to the act. * * * These practices were frankly admitted by substantially all carriers, and while on behalf of some lines a desire to observe car service rules was expressed, it was stated that they could not do so unless other lines would also conform to those rules. * * *

The Commission noted that there was some "question of the Commission's jurisdiction to enter an order requiring the carriers to observe reasonable rules for the exchange, interchange, and return of cars" (42 I.C.C. at 670–671), but concluded that "in the emergency that doubt should be resolved in favor not only of the carriers who are wrongfully deprived of the use of their cars, but in favor of shippers and

of the general public" (42 I.C.C. at 674). It accordingly made the railroads' own car service rules mandatory as to certain specified types of cars, which were in particularly short supply (42 I.C.C. at 674–675). In essence, those rules, like the rules involved in this case, required that such cars be returned, loaded or empty, in the direction of the owning road.

The Commission's prescription of those car service rules was never challenged in court. Because its power in this area was unclear, however, the Commission took prompt action to secure legislation specifically authorizing it to prescribe uniform car service rules for all rail carriers. See Interstate Commerce Commission, *30th Annual Report*, pp. 67–69, 71–73, 91–92 (1916). As a result of this action, Representative Esch of the House Committee on Interstate and Foreign Commerce introduced a bill substantially incorporating the Commission's proposal.[18] After undergoing various amendments,[19] the bill emerged as the Esch Act of 1917.

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[18] H.R. 20352, 64th Cong., 2d Sess., reintroduced as H.R. 328, 65th Cong., 1st Sess. The bill is set forth in Hearings on H.R. 19546, H.R. 20256 and H.R. 20352 Before the House Committee on Interstate and Foreign Commerce ("House Hearings"), 64th Cong., 2d Sess., pp. 3, 18.

[19] The original Esch bill authorized the Commission to impose car service rules in emergencies without hearing. After extensive hearings (see House Hearings), the House Commerce Committee reported the bill for enactment substantially as introduced. See H. Rep. No. 18, 65th Cong., 1st Sess. Following enactment by the House, hearings were held in the Senate which disclosed a need for car service regulation in non-emergency periods. See Hearings on S. 636 Before the Subcommittee of the Senate Committee on Interstate Commerce

The legislative history of the Act leaves no doubt that Congress intended to authorize the Commission to prescribe mandatory car-service rules such as those already voluntarily adopted by the rail industry. Indeed, then-Chairman Hall of the Commission, testifying in support of the bill, noted that the car service rules of the American Railway Association were not observed either during periods of freight car abundance or during periods of shortage. House Hearings, pp. 15–16. He testified that the word "rules" and the term "car service" had been used in the bill to make it plain (*id.* at 19):

> * * * that what we are talking about includes what [the railroads] have been talking about, when publishing through the American Railway Association their "car-service rules," their "per diem rules," and maintaining their "commission on car service."

See also the statement of Mr. F. B. Dow, attorney for the Commission. Senate Hearings, pp. 19–20.

That Congress recognized the Commission's request for authority as one for the enforcement, where appropriate, of the carriers' own rules for returning cars to owners and supported the request is equally

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("Senate Hearings"), 65th Cong., 1st Sess., pp. 30–32. Accordingly, together with other significant changes, the bill was amended to authorize the Commission to establish at any time "reasonable rules" with respect to car service following a hearing. See S. Rep. No. 43, 65th Cong., 1st Sess. As so amended, the bill was passed by both the Senate and the House and signed into law.

clear. Both Congressman Esch (House Hearings, p. 26) and Senator Cummings (Senate Hearings, pp. 14, 22) expressed their belief during the hearings that the Commission would, under the proposed legislation, enforce the American Railway Association's own rules or establish similar rules requiring the return of freight cars to their owners. See also House Hearings, p. 82. And the Senate report recommending enactment of the bill which became the Esch Act specifically stated (S. Rep. 43, 65th Cong., 1st Sess., p. 4):

> The American Railway Association has adopted rules providing for the return of cars to the owning roads, but their rules, no doubt adopted in the best of faith, have not been observed by some of the carriers. Under the circumstances, your committee is of the opinion that the Interstate Commerce Commission should be clothed not only with authority to make the necessary rules, but also with the power to see that they are properly enforced.

The statutory discretion and power to promulgate effective and urgently needed car service rules, vested in the Commission by Congress, is here largely negated. In holding that such rules may only be enforced if the Commission finds an owner line car shortage and that non-owner lines have the financial ability to absorb new car expenditures, the district court imposed conditions having no basis whatever in the language or the history of the Esch Act.

B. THERE IS A RATIONAL BASIS FOR THE COMMISSION'S CONCLUSION THAT MANDATORY OBSERVANCE OF RULES 1 AND 2 WILL PROVIDE AN INCENTIVE TO THE RAILROADS TO ACQUIRE AN ADEQUATE FLEET OF FREIGHT CARS

The district court conceded that there may be substantial evidence of a general freight car shortage. Indeed, the record reflects extensive evidence of such a shortage as well as the Commission's detailed analysis of data covering a ten year period showing a shortage (see pp. 9–12, *supra*).[20] To place the Commission's action in proper perspective, it must be stressed that the Commission was concerned here primarily with increasing the nation's *supply* of freight cars so as to overcome the shortage, and only incidentally with improving the *distribution* of the existing car fleet (see p. 14, *supra*). That mandatory observance of AAR Car Service Rules 1 and 2 would increase the supply of freight cars, was supported by the following line of reasoning, clearly articulated by the Commission (see pp. 13–15, *supra*):

First, the evidence established that an alarmingly low percentage of freight cars was on their owners' tracks at any given time and that this low percentage was a contributing factor to the freight car shortage. Second, there is little incentive for railroads to invest in expensive new equipment[21] when often the main

[20] The Commission's documentation of the shortage fully refuted the hearing examiner's conclusion that no national shortage existed (see pp. 31–33, *infra*).

[21] Plain boxcars cost a minimum of $16,000 each, with more elaborate boxcars running as high as $37,000 (App. 201).

beneficiaries of such investments are other lines. Third, mandatory observance of the two car service rules would cause cars to be returned to their owners more quickly, would increase their availability to the owners and would thus provide an incentive for the railroads to purchase new equipment. Fourth, with greater use of their cars, the railroads would be in a better position to judge their ownership needs and the needs of their shippers. Finally, the responsibility for freight car shortages would be placed squarely on lines owning insufficient equipment. The Commission did not ignore the extra switching and short delays which might result from enforcement of the rules, but concluded that they were outweighed by the anticipated benefits from enforcement.[22]

The Commission was not alone in its conclusion that mandatory observance of the car service rules would help overcome the shortage of freight cars; as we have noted (pp. 10–11, *supra*), witnesses for the

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[22] The Commission findings are consistent with its earlier findings, made in 1947 after an investigation of freight car shortages (*Car Service, Freight Cars*, 268 I.C.C. 687, 690). There, as here, the Commission found:

> * * * At the present time the car-service rules to a large extent are suspended and disregarded by both carriers and shippers. Generally a consignee receiving a loaded shipment in a railroad owned car may now remove the lading and immediately reload the car to a point in any direction, whereas, under the provisions in the car-service rules, if it had no load for a destination in the direction of the owning railroad it would be expected to release the car and hold its out-bound shipment until another car could be funished.

railroads and shippers testified that enforcement of the car service rules would help alleviate freight car shortages. Moreover, Congress' continued investigation of the problem of freight car shortages has produced substantial testimony attesting to the nonobservance of car service rules and the need for their enforcement. For example, a witness for the Kansas City Board of Trade testified in 1959 (Hearings Before a Special Subcommittee on Freight Car Shortage of the Senate Committee on Interstate and Foreign Commerce on S. 1789, S. 1811, and S. 1812, 86th Cong., 1st Sess., p. 31):

> The experience of the trade over many years has been that the grain-carrying lines in general provide proportionately more and better cars for carrying grain than the lines in the East and South, and as the predominant movement of traffic is eastbound, the result has been that a high proportion of the cars are unloaded outside of the western territory and are then available for use by the destination lines.
>
> Under the car-service agreement of the carriers, when these cars are unloaded they are supposed to be moved back toward the home line and the imbalance corrected by delivering empty cars at the junctions with the western lines. Too often, however, experience showed that in times of general prosperity the destination lines were prone to use these western cars for their own loading, and so the imbalance continued to worsen instead of improve.

See, also, S. Rep. No. 445, 87th Cong., 1st Sess., p. 724.

Similarly, during the course of hearings on freight car shortages held in 1965, several witnesses called attention to non-enforcement of the railroads' car service rules as a factor contributing to the problems of car supply and distribution. Hearings Before the House Committee on Interstate and Foreign Commerce on H.R. 2230, H.R. 7165, and S. 1098, 89th Cong., 1st Sess., pp. 42, 64, 118, 127 and 250. See also Hearings Before a Subcommittee of the Senate Committee on Commerce on S. 179, etc., 89th Cong., 1st Sess., pp. 249, 279.

In short, the Commission properly concluded that enforcement of AAR Car Service Rules 1 and 2 was needed in the light of the national shortage of freight cars. Since, during most of this century, the AAR has been unwilling or unable effectively to enforce the rules, it was reasonable for the Commission to require their observance. Moreover, the fact that the operation of the car service rules adopted by the Commission "would resemble the practice" of the railroad industry is itself strong evidence of the reasonableness of the rules. See *Assigned Car Cases*, 274 U.S. 564, 582.

C. THE COMMISSION WAS NOT REQUIRED TO MAKE SPECIFIC FINDINGS RELATING TO SHORTAGES OF FREIGHT CARS ON INDIVIDUAL RAILROADS OR TO THE FINANCIAL ABILITY OF RAILROADS TO PURCHASE NEW EQUIPMENT

1. The district court found the Commission's report deficient in that it contained no finding that there was a freight car shortage on railroads owning rela-

tively large numbers of freight cars (J.S. App. 19–20), *i.e.*, the railroads that would benefit most from enforcement of the car service rules.[23] But such a finding is not necessary, since the determinative factor here is the existence of a national freight car shortage. Given the shortage, some railroads will have to purchase new equipment and the roads with deficient ownership of cars should bear the primary responsibility for such purchases; clearly, the responsibility does not lie with carriers who already own a sufficient number of freight cars to meet these responsibilities for handling interline traffic. The enforcement of car return rules is appropriate to assure owners greater use of their cars and to fix ultimate responsibility for the national shortage, whether or not a special shortage exists on owner lines.

The flaw in the reasoning of the court below was pinpointed by the district court in Florida, which upheld the same car service rules here in issue, when it observed (*Florida East Coast Railway Company* v. *United States*, 327 F. Supp. 1076, 1085 (M.D. Fla.); J.S. App. 201):

> The question is not, as the Pennsylvania court posed it, whether the shortage on the owner

[23] The district court expressed surprise that a seven-year study by the Commission should be climaxed by a one-sentence finding that a national freight car shortage exists (J.S. App. 18). While the Commission's statement under the "Findings" caption of its report that a shortage exists (J.S. App. 88) may be construed as its ultimate finding of fact, it is plain from even a cursory study of the report that the Commission made numerous subsidiary findings bearing directly on the necessity for and efficacy of mandatory car service rules.

> lines is more acute, but rather who should get first call on the use of cars during a shortage. Correctly stated than, we view the question as properly answered in the policy decision of the Commission to institute rules which would provide the greater usage to the owner lines.

In concluding that a finding of shortages on owner lines was necessary, the district court relied solely upon *Palmer* v. *United States*, 75 F. Supp. 63 (D.D.C.)—a decision declaring invalid the Commission's establishment of incentive per diem charges for the use of freight cars to improve the distribution of the existing freight car fleet.[24] But the *Palmer* decision, which was concerned solely with the Commission's power to prescribe per diem rates, is inapplicable here. The court in *Palmer* expressly distinguished from the Commission's challenged power to establish per diem rates the Commission's "broad" authority "to establish reasonable rules, regulations and practices with respect to car service, which includes the use, interchange and return of cars." 75 F. Supp. at 67. In finding that the Commission could not utilize the lever of incentive per diem payments in an effort to accomplish the return of cars to their owners, the court added that "[i]f the movement of empties to the owners is in the public interest for the time being the Act provides for that accomplishment by a direct requirement to that effect." 75 F. Supp. at 69.

[24] The *Palmer* holding was expressly overruled by Congress in enacting the 1966 amendment (80 Stat. 168) to 49 U.S.C. 1(14)(a). See S. Rep. 386, 89th Cong., 1st Sess., pp. 6–7; H. Rep. 1183, 89th Cong., 1st Sess., p. 6.

2. The district court also criticized the Commission for failing to consider "the capacity of the railroad industry to absorb new freight car capital expenditures" (J.S. App. 20–21).[25] But again, a specific finding is unnecessary. To overcome the freight car shortage, additional expenditure on new equipment will be necessary and the Commission can validly promulgate rules which will single out those responsible for the shortage. Once singled out, aware of what ownership levels it must maintain and assured that it will have adequate use of its own cars, a railroad, in the words of the Commission, "will be able to justify the investment required" (J.S. App. 66).[26] To the extent that funds are not immediately available, the carrier could attempt to secure financing on the basis of anticipated revenue increases or through other means. See statement of Southern Pacific (App. 200–201)

[25] The district court also faulted the Commission for failing to consider the financial effects upon the shipping public (J.S. App. 25). The agency did, however, consider the potential burden on shippers in terms of "extra switching and short delays", concluding that it was outweighed by the "overall benefit to be derived when originating lines obtain quick return of their system cars" (J.S. App. 67).

Of course, shipping rates may be increased in the future to reflect increased capital expenditures by railroads to purchase new equipment. But such expenditures are necessary to meet the demands of the shipping public for freight car service.

[26] Even railroads involved in bankruptcy proceedings have been able to justify expenditures for new equipment under 11 U.S.C. 205(j). See, *e.g.*, BNA Corporation Reorganization Reporter (Penn Central), ¶1011, for example of orders of the bankruptcy court authorizing the Penn-Central to purchase or lease caboose cars (p. 480), freight cars (p. 1256), locomotives (pp. 686, 1374); and passenger cars (pp. 347, 428).

Finally, a railroad encountering serious financial difficulty as a result of the operation of the car service rules may seek an exception from their imposition under Rule 19 promulgated by the full Commission on rehearing (see discussion at pp. 33–36, *infra*). In light of this provision, it was particularly unnecessary for the Commission to analyze the potential financial difficulties of some railroads which might result from pressures to purchase new equipment.

D. THE DISTRICT COURT PLACED UNDUE EMPHASIS ON THE HEARING EXAMINER'S RECOMMENDED REPORT

In finding the Commission's report deficient, the district court took particular note of the examiner's conclusions that there was insufficient evidence to find a general freight car shortage (App. 22–27), that the existing voluntary car service rules were working adequately to insure proper car distribution (App. 45–48), and that imposition of mandatory car service rules "would be of substantial detriment to rail carriers and shippers" (App. 33). The district court found that these conclusions were not dealt with satisfactorily by the Commission (J.S. App. 18). In fact, however, the Commission's report answers and refutes each of the examiner's critical conclusions. Thus, the Commission exhaustively analyzed the evidence before finding that a nationwide car shortage in fact existed (see pp. 12–18, *supra*). The Commission also found that the existing distribution systems were not working adequately, stating as to the system of car assignment (J.S. App. 58),

> * * * unlike the examiner, we cannot ignore evidence of waste and special privilege resulting from this method of doing business. Instances were shown where carriers held cars for prospective loading from 4 to 80 days or more even though many of these cars belonged to another railroad. * * *

Finally, the Commission, while acknowledging the disadvantages which might accrue from mandatory observance of the proposed rules, nonetheless concluded that, balanced against the resultant improved car supply, these disadvantages were not dispositive (J.S. App. 66, 67).

The appropriate treatment to be accorded an examiner's recommendation of a decision adverse to that reached by the Commission was articulated by this Court in *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 492–497, and has recently been restated in *Greater Boston Television Corporation* v. *Federal Communications Commission,* 444 F. 2d 841, 853 (C.A.D.C.), certiorari denied, 403 U.S. 923:

> The Examiner's decision is part of the record, and the record must be considered as a whole in order to see whether the result is supported by substantial evidence. The agency's departures from the Examiner's findings are vulnerable if they fail to reflect attentive consideration to the Examiner's decision. Yet in

> the last analysis it is the agency's function, not the Examiner's, to make the findings of fact and select the ultimate decision, and where there is substantial evidence supporting each result it is the agency's choice that governs. [Footnotes omitted.]

The findings of the Commission in this case "reflect attentive consideration to the Examiner's decision." The Commission thus did not err merely because it reached a contrary conclusion. See *Assigned Car Cases*, 274 U.S. 564, 580–581; *American Trucking Associations* v. *A. T. & S. F. R. Co.*, 387 U.S. 397, 412; *Illinois Central Railroad Company* v. *Norfolk & Western Railway Company*, 385 U.S. 57, 69. And, as we have previously shown, the Commission's order was properly based on the record before it and was amply justified.

II. THE ADMITTED NEED FOR EXCEPTIONS TO THE CAR SERVICE RULES, RECOGNIZED AND PROVIDED FOR BY THE COMMISSION, DOES NOT INVALIDATE THE REASONABLENESS OF REQUIRING GENERAL OBSERVANCE OF THE RULES

In addition to faulting the Commission for failing to make specific findings, the court below held that the fact that full compliance with the car service rules was not feasible also contributed to its conclusion that the rules were unreasonable (J.S. App. 25). Although the court did note that the Commission had provided

for exceptions,[27] it did not discuss the means for obtaining the exceptions other than to state that the "imposition of statutory penalties could be dependent upon a subjective determination of the field representatives of the Commission" (J.S. App. 15–16, 25).

The claim that fair administration of the rules, including the exception provisions, is not possible is answered by the position of the railroad industry itself. Though opposing mandatory prescription of the rules, the AAR conceded in the alternative before the Commission on petition for reconsideration that (App. 340):

> There is only one feasible way to operate the railroads under a mandatory system of car serv-

[27] As ultimately promulgated, the Commission orders provide (J.S. App. 64, 65, 172):

NOTES TO CAR SERVICE RULES 1 AND 2

* * * * *

(B) Inequities resulting from these rules should be resolved by negotiations between the roads involved, and exception to the rules is permitted following such resolvement and concurrence by the Car Service Division [of the AAR].

* * * * *

Rule 19—Exceptions. Exceptions to the rules (prescribed by the Interstate Commerce Commission for mandatory observance) for the purpose of further improving car supply and utilization, increasing availability of cars to their owners, improving the efficiency of railroad operations or alleviating inequities or hardships, may be authorized by the Director or Assistant Director of the Bureau of Operations, Interstate Commerce Commission, Washington, D.C.

> ice rules. The Chairman of the AAR Car Service Division must be allowed to grant exceptions to the rules whenever literal compliance would be detrimental to or frustrate the objectives of the rules, with the possible proviso that, should the Commission desire to retain overall supervision of such procedure, all exceptions granted shall be filed with the Commission by the Chairman and be subject to suspension or cancellation. Specifically, the railroad respondents request that * * * the following provision must also be prescribed as an integral part of the same set of regulations * * *.

AAR then proposed an exception provision in language substantially identical to that adopted by the full Commission on reconsideration (J.S. App. 172).[28] Indeed, the net effect of the overall exceptions procedure provided by the Commission is even more liberal than that requested by the AAR. Under the Commission's provisions, a railroad may secure relief even after a request for an exception is initially denied by the AAR Car Service Division.

[28] Compare *Assigned Car Cases*, 274 U.S. 564, 582, where this Court, in sustaining the validity of certain car service rules applicable to railroad fuel cars, relied upon the fact that administration of the rules "would resemble the practice of the Car Service Section of the Railroad Administration." The Car Service Section of the Railroad Administration was in fact the Commission on Car Service of the American Railroad Association. See, E. Coughlin, *Freight Car Distribution and Car Handling In the United States*, 309 (Association of American Railroads, 1956).

In finding the exception provisions defective, the district court apparently believed that criminal penalties would automatically attach to every instance of non-compliance with the car service rules (J.S. App. 25). But such is not the case. In most instances, it is anticipated that the railroads will either make a good faith effort to comply with the rules or apply for an exception where compliance appears to be impossible or unduly burdensome. And in instances of violations which are not excused by the granting of exceptions, the imposition of criminal penalties would still be dependent upon a showing of criminal intent on the part of the carriers. Cf. *United States* v. *Southern Railway Company*, 250 F. Supp. 759, 770 (D. S.C.), reversed on other grounds, 380 F. 2d 49 (C.A. 4).

Nor is there substance to the contention that a general rule requiring less than one hundred percent compliance is unreasonable and invalid (J.S. App. 24–25). It is well recognized that the Commission's undisputed discretion to proceed in a complex area such as car service regulation through rules of general application entails a concomitant authority to provide exemption procedures to permit consideration of special circumstances. *Permian Basin Area Rate Cases*, 390 U.S. 747, 821–822; *WAIT Radio* v. *Federal Communications Commission*, 418 F. 2d 1153, 1157 (C.A. D.C.). The flexibility afforded by waiver provisions, which necessarily assume less than total compliance with the underlying rule, is a proper element in valid

agency rule making. *United States* v. *Storer Broadcasting Company*, 351 U.S. 192, 204–205; *National Broadcasting Company* v. *United States*, 319 U.S. 190, 224–225. Moreover, as recognized in *WAIT Radio*, *supra*, 418 F. 2d at 1159 (footnote omitted), there is a practical need for rule exemptions because

> * * * a rule is more likely to be undercut if it does not in some way take into account considerations of hardship, equity, or more effective implementation of overall policy, considerations that an agency cannot realistically ignore, at least on a continuing basis. The limited safety valve permits a more rigorous adherence to an effective regulation.

Appellees and the district court may disagree with the wisdom of the Commission's conclusion that mandatory imposition of the car service rules will provide an incentive to the railroads to provide themselves with an adequate fleet of freight cars. Such "predictions of the economic future" (*American Trucking Associations* v. *United States*, 344 U.S. 298, 309), however, are for the sound judgment and discretion of the Commission. "[W]hether the Commission pursued the course of wisdom" in ordering mandatory observance of the rules is not a proper inquiry for the reviewing court (*American Trucking Associations* v. *A. T. & S. F. R. Co.*, *supra*, 387 U.S. at 412; *Northern Lines Merger Cases*, 396 U.S. 491, 513), since "[t]hese are matters left by Congress to

the administrative 'tribunal appointed by law and informed by experience'." *Assigned Car Cases, supra,* 274 U.S. at 581. In the present case, the Commission concluded (J.S. App. 62):

> * * * From the evidence of record it is obvious that voluntary observance of these rules has not been the answer to this most vexing problem. Car shortages still exist. We have given the railroad industry every opportunity to provide a solution and have stood by hopefully waiting for the desired result. It is time that some positive action is taken, and we intend to do so now.

In the circumstances, the Commission's action was reasonable and was, we submit, an appropriate exercise of its judgment and discretion in meeting its statutory responsibilities by means of administrative rule making. Cf. *Permian Basin Area Rate Cases, supra; WBEN, Inc.* v. *United States,* 396 F. 2d 601, 617 (C.A. 2), certiorari denied, 393 U.S. 914; *Federal Power Commission* v. *Texaco, Inc.,* 377 U.S. 33, 44.

CONCLUSION

For the reasons stated, the judgment of the district court should be reversed.

Respectfully submitted.

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U.S. GOVERNMENT PRINTING OFFICE: 1972

No. 71-[illegible]

In the Supreme Court of the United States

October Term, 1971

United States of America and
Interstate Commerce Commission, Appellants

v.

Allegheny-Ludlum Steel Corporation, et al.

On Appeal from the United States District Court for the Western District of Pennsylvania

Reply Brief for the United States and the Interstate Commerce Commission

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-227

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

ALLEGHENY-LUDLUM STEEL CORPORATION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

REPLY BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

1. The appellee steel companies mischaracterize our treatment of the legislative history of the Esch Act, 49 U.S.C. 1 (14)(a). We do not contend, as appellees suggest (Brief for Allegheny-Ludlum Steel Corporation, et al., 15 (hereafter, "Steel Br.")), that the legislative history of the Act by itself "establishes" the reasonableness of the Commission's action in this case, but rather that, in adopting the "reasonable rules" standard of Section 1(14)(a), Congress specifically intended "to authorize the Commission to enforce, where appropriate, the existing car service rules volun-

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tarily adopted but frequently ignored by the railroad industry" (Govt. Br. 19). Our survey of the legislative history (Govt. Br. 18–23) fully supports the conclusion that Congress anticipated and sanctioned the enforcement of such rules in instances where the Commission determines, after hearing, that the public interest requires such enforcement.[1]

In attempting to discount the legislative history, the appellee steel companies stress (Steel Br. 16–17) the Senate's rejection of a provision which would have required the carriers to file the car service rules as part of their tariffs. But the deletion of this provision in no way negates the authority of the Commission to prescribe the rules; rather, it merely reflects the Senate's view that the determination of whether and when, these rules should be made mandatory should be a matter for the sound judgment and discretion of the Commission. Indeed, in presenting the report and amended bill of the Senate Committee on Interstate Commerce, Senator Pomerene stated that it was the purpose of the Senate amendments to "confer fuller authority upon the Interstate Commerce Commission." See 55 Cong. Rec. 2631.

The steel appellees also argue (Steel Br. 14–15) that the legislative history we rely on is "largely ir-

[1] The appellee steel companies correctly point out (Steel Br. 5, n. 5) that the testimony of one of the railroad witnesses relied on by us for the proposition that some railroads conceded that enforceable car service rules were needed (App. 194–195; cited at Govt. Br. 10) was stricken from the record (App. 337). Our error was inadvertent, and we no longer rely on that testimony. The stated proposition, however, is amply supported by the remaining citations on page 10 and in note 12 of our brief.

revelant" because much of it relates to the Esch bill as introduced in the House which would have granted the Commission only emergency authority to promulgate car service rules; not until later did the Senate amend the bill to provide for general authority to establish such rules. Not only does that argument not account for the legislative history subsequent to the Senate amendment (see Govt. Br. 23); it ignores the fact that the purpose of the Senate amendments was to confer greater—rather than less—authority upon the Commission. Plainly if, as we contend (Govt. Br. 19–22), the original Esch bill was directed to problems of car supply, its scope was not lessened by amendments designed to increase the breadth of the Commission's power.

2. The steel appellees now contend (Steel Br. 10–11; 17–18), in an argument not previously made, that the Commission's prescription of mandatory car-service rules is inconsistent with the policy of Section 1(21) of the Interstate Commerce Act, 49 U.S.C. 1(21), which provides that the Commission cannot require a railroad to acquire additional facilities without a finding that the expense involved will not impair the carrier's ability to perform its duty to the public. Even apart from the basic issue of whether the requirements of Section 1(21) are applicable to the acquisition of freight cars, however, the Commission's order here is not based on its powers under that Section and does not direct any railroad to acquire equipment; Section 1(21) is thus inapplicable.

Acknowledging that Section 1(21) may not be directly applicable here, the steel appellees suggest (Steel

Br. 17–18) that the Section establishes a general policy applicable throughout the Act requiring a finding of financial ability whenever a Commission action is intended to induce some carriers to acquire cars. Appellees, however, cite no evidence that Congress intended that the specific requirement in Section 1(21) for a finding of financial ability should be generally applicable throughout the Act. Over a period of years, the Commission has issued numerous orders designed to encourage the railroads' acquisition of additional equipment (such as, for example, the prescription of an increase in basic per diem [2] and the adding of an incentive element to the basic per diem charges [3]). Although such orders have a more direct effect upon equipment acquisition than do the mandatory car-service rules here at issue, no one has ever suggested that they must be predicated upon a Section 1(21) finding of financial ability.

3. The steel companies assert that mandatory observance of the car service rules will result in lessened competition among both shippers and carriers (Steel Br. 24–30). They argue with respect to shippers that "business firms that located their plants and designed their production and shipping facilities in reliance upon the railroad industry's practice of free access

[2] See *Union Pacific Railroad Co.* v. *United States*, 300 F. Supp. 318 (D. Neb.); *Boston and Maine Railroad* v. *United States*, 257 F. Supp. 615 (D. Mass.), affirmed per curiam, 396 U.S. 27.

[3] See *Long Island Railroad Co. v. United States*, 318 F. Supp. 490 (E.D. N.Y.); *Florida East East Coast Ry. Co.* v. *United States*, 322 F. Supp. 725 (M.D. Fla.), appeal docketed, No. 70–279.

to and use of cars in the national freight car fleet will be arbitrarily deprived of reasonable access to rail transportation services if the lines on which they are located are among the car-poor carriers" (Steel Br. 24; footnote omitted). Ignored is the fact that whatever "practice of free access" existed previously was in direct derogation of the rail industry's long-standing Code of Car Service Rules (Govt. Br. 5). As the Commission found, violation of these rules frequently was the result of "special privileges" accorded favored shippers (J.S. App. 58–59). "Our purpose," the Commission declared, "is to induce the carriers to cooperate more fully among themselves and to provide some relief to the general shipping public which has not been receiving the same car service as a number of favored shippers" (J.S. App. 63). Mandatory compliance will have the salutary effect in many instances of removing discriminatory service practices based on shipper size and financial strength, thus permitting less advantaged shippers to bid competitively for available car service. Furthermore, as the Commission noted, even if some shippers must face car shortages as a result of the Commission's action, "the needs of shippers affected should not be met with equipment of carriers which obtained the cars to serve other shippers" (J.S. App. 66).

With respect to inter-carrier competition, the steel appellees argue (Steel Br. 25) that smaller carriers are able to compete effectively only because they have access to a general pool of cars and that the Commission's decision will eliminate such carriers' access to this car pool. The Commission's decision, however, does not

eliminate access to foreign freight cars, but only determines the conditions under which such cars may be used. The fact that competition between some carriers serving common shippers may be incidentally affected by reason of the relatively greater effect of these conditions on the carriers with low car ownership—a difference in effect which, of course, is the very objective of the rules—does not undermine the validity of the Commission's determination that, in the present circumstances, enforcement of the car service rules is appropriate to alleviate the chronic shortage of freight cars.

For the reasons stated herein and in our main brief, it is respectfully submitted that the judgment of the district court should be reversed.

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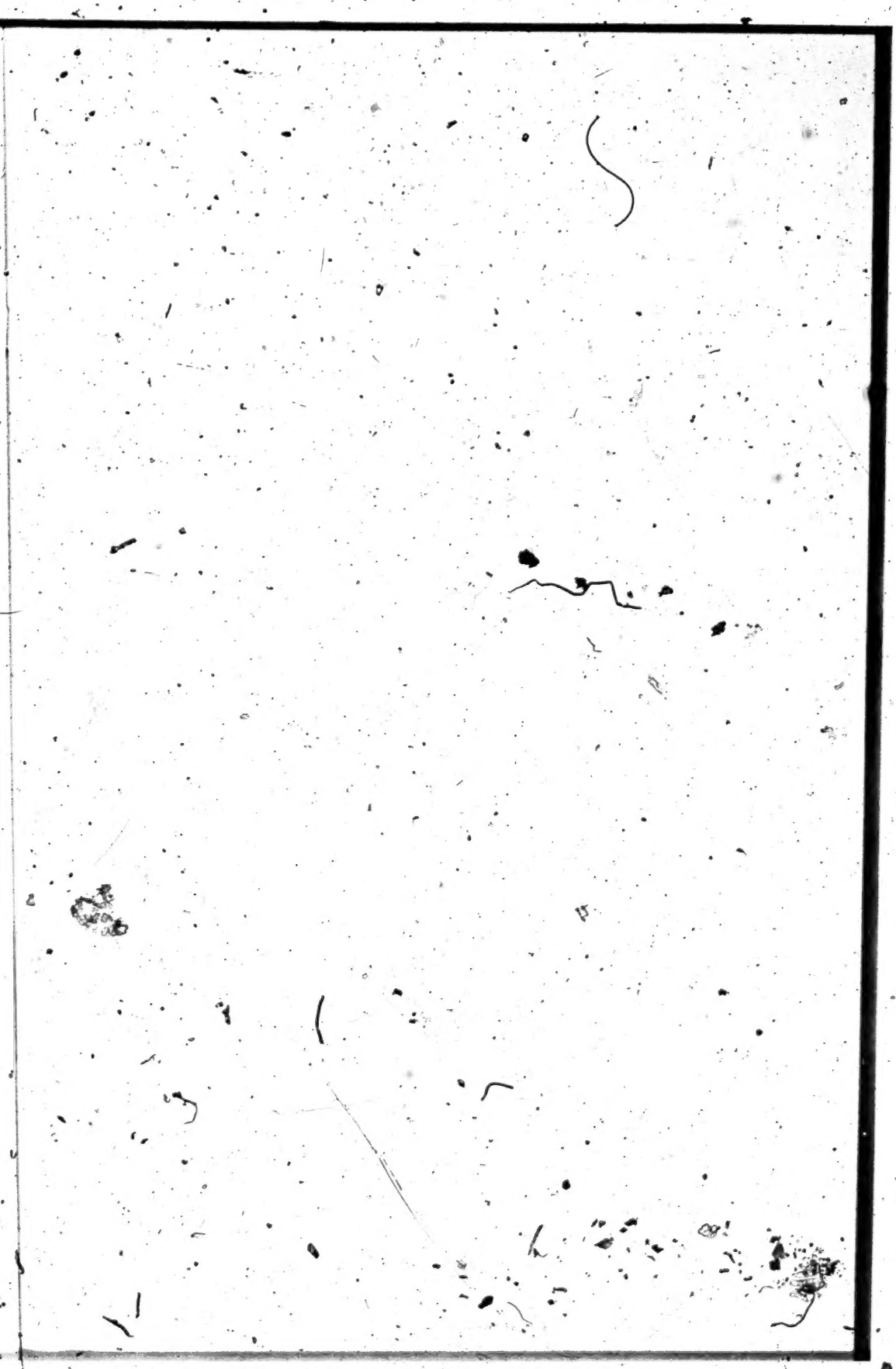

UNITED STATES ET AL. *v.* ALLEGHENY-LUDLUM STEEL CORP. ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

No. 71-227. Argued March 27, 1972—Decided June 7, 1972

1. Two "car service rules" promulgated by the Interstate Commerce Commission (ICC), requiring generally that unloaded freight cars be returned in the direction of the owning railroad, are "reasonable" under the Esch Car Service Act of 1917, in view of the ICC's finding, for which there is substantial record support, of a national freight car shortage, and its conclusion that the shortage could be alleviated by mandatory observance of the rules, which would give the railroads greater use of their cars and provide an incentive for the purchase of new equipment. Pp. 744–755.
2. The ICC proceeding in this case was governed by, and fully complied with, § 553 of the Administrative Procedure Act. Pp. 756–758.

325 F. Supp. 352, reversed.

REHNQUIST, J., delivered the opinion for a unanimous Court.

Samuel Huntington argued the cause for the United States et al. With him on the briefs were *Solicitor General Griswold, Assistant Attorney General McLaren, Acting Assistant Attorney General Comer, Fritz R. Kahn, Betty Jo Christian,* and *James F. Rao.*

Max O. Truitt, Jr., and *William M. Moloney* argued the cause for appellees. With *Mr. Truitt* on the brief for appellees Allegheny-Ludlum Steel Corp. et al. was *Sally Katzen.* With *Mr. Moloney* on the brief for appellee Association of American Railroads were *James I. Collier, Jr.,* and *Gordon E. Neuenschwander.* *John F. Donelan* filed a brief for appellee National Industrial Traffic League.

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

In 1969 the Interstate Commerce Commission promulgated two "car service rules" that would have the

general effect of requiring that freight cars, after being unloaded, be returned in the direction of the lines of the road owning the cars. Several railroads and shippers instituted two separate suits under 28 U. S. C. §§ 2321–2325 to enjoin enforcement of these rules. In *Florida East Coast R. Co.* v. *United States*, 327 F. Supp. 1076 (MD Fla. 1971), the action of the Commission was sustained by a three-judge court, but in the case now before us a similar court for the Western District of Pennsylvania held the Commission's order invalid. 325 F. Supp. 352 (WD Pa. 1971). We noted probable jurisdiction, 404 U. S. 937, and for the reasons hereinafter stated we conclude that the Commission's action here challenged was within the scope of the authority conferred upon it by Congress and conformed to procedural requirements.

The country's railroads long ago abandoned the custom of shifting freight between the cars of connecting roads, and adopted the practice of shipping the same loaded car over connecting lines to its ultimate destination. The freight cars of the Nation thus became in essence a single common pool, used by all roads. This practice necessarily required some arrangements for eventual return of a freight car to the lines of the road which owned it, and in 1902 the railroads through their trade association dealt with this and related problems in a code of car-service rules with which the roads agreed among themselves to comply. The effect of the Commission's order now under review is to promulgate two of these rules[1] as the Commission's own, with the result that sanctions attach to their violation by the railroads.

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[1] "Rule 1. Foreign cars, empty at a junction with the home road, must be:

"(a) Loaded at that junction to or via home rails, or;

"(b) Delivered empty at that junction to home road, except in

Because of critical freight-car shortages experienced during World War I, Congress enacted the Esch Car Service Act of 1917, which empowered the Commission to establish reasonable rules and practices with respect to car service by railroads. 40 Stat. 101, 49 U. S. C. § 1 (14)(a). The pertinent language of that Act provides:

> "The Commission may . . . establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this chapter. . . ."

No party to this proceeding has questioned that the rules promulgated by the Commission are "rules, regulations, and practices with respect to car service," and therefore the issue before us is whether these rules are "reasonable" as that term is used in the Esch Act. The court below concluded, and the appellees here contend, that for a number of reasons the rules in question do not meet the statutory requirement of reasonableness. Appellees also contend that the findings of the Com-

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instances where Rule 6 has been invoked, or unless otherwise agreed by roads involved.

"Rule 2. Foreign empty cars other than those covered in Rule 1 shall be:

"(a) Loaded to or via owner's rails.

"(b) Loaded to a destination closer to owner's rails than is the loading station or delivered empty to a short line or switch loading road for such loading. (Car Selection Chart is designed to aid in so selecting cars for loading.)

"(c) Delivered empty to the home road at any junction subject to Rule 6.

"(d) Delivered empty to the road from which originally received under load, at the junction where received, *Except* that when handled in road haul service, cars of direct connection ownership may not be delivered empty to a road which does not have a direct connection with the car owner.

"(e) Returned empty to the delivering road when handled only in switching service." Jurisdictional Statement 64.

mission are insufficient under the Administrative Procedure Act, 5 U. S. C. § 551 *et seq.*

The record of proceedings before the Commission establishes that the Commission has been increasingly concerned with recurring shortages of freight cars available to serve the Nation's shippers. It found that shortages of varying duration and severity occur both as an annual phenomenon at peak loading periods and also during times of national emergency. The result of these shortages has been that roads were unable to promptly supply freight cars to shippers who had need of them.

Underlying these chronic shortages of available freight cars, the Commission found, was an inadequate supply of freight cars owned by the Nation's railroads. The Commission concluded that one of the principal factors causing this inadequate supply of freight cars was the operation of the national car-pool system. In practice this system resulted in freight cars being on lines other than those of the owning road for long periods of time, since the rules providing for the return of unloaded freight cars in the direction of the lines of the owning road were observed more often than not in the breach. Since the owning road was deprived of the use of its own freight cars for extended periods of time, the Commission found, there was very little incentive for it to acquire new freight cars. In addition, since a road which owned a supply of freight cars inadequate to serve its own on-line shippers could generally, by hook or by crook, arrange to utilize cars owned by other roads, the national car-pool system significantly reduced the normal incentive for a railroad to acquire sufficient equipment to serve its customers. The rules promulgated by the Commission are intended to make those railroads whose undersupply of freight cars contributes to the national shortage more directly feel the

pinch resulting from the shortage that they have helped to cause. By thus requiring each road to face up to any inadequacies in its ownership of freight cars, the rules are intended in the long run to correct the nationwide short supply of freight cars that the Commission has found to exist.

Central to the justification for the Commission's promulgation of these rules is its finding that there was a nationwide shortage of freight car ownership. The court below assumed the correctness of that finding, and we conclude that it was supported by substantial evidence.

Shortly after the Second World War, the Commission conducted an investigation into the adequacy of freight car supply and utilization by the Nation's railroads. The Commission in that proceeding concluded that there was "an inadequacy in freight car ownership by rail carriers as a group." Recognizing that this inadequacy was caused at least in part by the inability of the railroads to acquire new equipment, first during an era of wartime demand and then during an era of post-war boom, the Commission at that time imposed no obligation on the railroads except to require them to file with it their rules and regulations with respect to car service.

In 1963 the Commission began this investigation into the adequacy of car ownership, distribution, and utilization. At the conclusion of the investigatory phase of the proceeding in 1964, the Commission determined that there was a shortage of freight cars in general service. 323 I. C. C. 48 (1964). Formal notification of proposed rulemaking was then issued, and a questionnaire was submitted to the various railroads for the purpose of compiling data on car ownership and use. After these data were gathered, railroads, shippers, and other interested parties were permitted to file verified statements providing further factual material and to adduce

legal arguments. The Commission, through its Bureau of Operations, presented to the Hearing Examiner tabular collations of the freight car ownership and use data, and suggested a formula by which a railroad might compute the sufficiency of its freight car ownership. The Bureau also proposed that the entire Code of Car Service Rules adopted by the Association of American Railroads be promulgated by the Commission for mandatory observance.

Many railroads and shippers opposed mandatory enforcement of the rules. Some roads and shippers appeared in favor of at least some mandatory enforcement of the rules, arguing that unless some compulsion were used in enforcing them, cars purchased by a railroad for use by its shippers would continue to be detained for inordinately long periods of time by other roads.

After 50 days of hearings, the Trial Examiner issued his report, recommending against mandatory enforcement of the car-service rules. Although the Commission, prior to referring the matter to him, had previously made a definitive finding that a shortage of freight cars existed, the Examiner's report stated that there was no competent evidence in the record developed before him upon which such a determination could be made. The Examiner assigned several reasons for recommending against mandatory enforcement of the rules.

The Commission issued a comprehensive opinion disagreeing with the trial examiner in many respects, and ordering that two of the car-service rules be promulgated as rules of the Commission with sanctions attaching to noncompliance. Finding that "[t]he continuing relocation of cars on owner's lines is of major importance to the maintenance of an adequate car supply," [2] the Commis-

[2] 335 I. C. C. 264, 293 (1969).

sion concluded that the inconveniences feared by the shippers were outweighed by the long-term benefit that would accrue from the mandatory enforcement of the two car-service rules.

After its first order adopting the two rules was issued, the Commission considered claims that there was need for some procedure for exceptions to the mandatory enforcement of the rules. A supplemental order then established another rule that permitted the railroads to seek exception from the Commission's Bureau of Operations, in order to alleviate inequities and hardships.[3]

The court below held that the rules were not "reasonable," as that term is used in the Esch Act, for three reasons. First, although there was a general finding of a nationwide freight car shortage, the court said that a specific shortage on owner lines should have been found in order to justify the promulgation of these rules. Second, it said there should have been a finding as to the financial effects upon the railroads and shippers who would be affected by the rules. Finally, it supported its conclusion that the rules were not "reasonable" by the fact that even though violation of the rules could be enforced by monetary penalties, the Commission nonetheless conceded that obtaining complete compliance with them would be impossible.

The standard of judicial review for actions of the Interstate Commerce Commission in general, *Western Chemical Co.* v. *United States*, 271 U. S. 268 (1926),

[3] "Rule 19—Exceptions

"Exceptions to the rules (prescribed by the Interstate Commerce Commission for mandatory observance) for the purpose of further improving car supply and utilization, increasing availability of cars to their owners, improving the efficiency of railroad operations, or alleviating inequities or hardships, may be authorized by the Director or Assistant Director of the Bureau of Operations, Interstate Commerce Commission, Washington, D. C." Jurisdictional Statement 172.

and for actions taken by the Commission under the authority of the Esch Act in particular, *Assigned Car Cases*, 274 U. S. 564 (1927), is well established by prior decisions of this Court. We do not weigh the evidence introduced before the Commission; we do not inquire into the wisdom of the regulations that the Commission promulgates, and we inquire into the soundness of the reasoning by which the Commission reaches its conclusions only to ascertain that the latter are rationally supported. In judicially reviewing these particular rules promulgated by the Commission, we must be alert to the differing standard governing review of the Commission's exercise of its rulemaking authority, on the one hand, and that governing its adjudicatory function, on the other:

> "In the cases cited, the Commission was determining the relative rights of the several carriers in a joint rate. It was making a partition; and it performed a function quasi-judicial in its nature. In the case at bar, the function exercised by the Commission is wholly legislative. Its authority to legislate is limited to establishing a reasonable rule. But in establishing a rule of general application, it is not a condition of its validity that there be adduced evidence of its appropriateness in respect to every railroad to which it will be applicable. In this connection, the Commission, like other legislators, may reason from the particular to the general." *Assigned Car Cases, supra*, at 583.

The finding of the Commission as to a nationwide shortage of freight cars was based primarily on data submitted by the railroads themselves covering the years 1955 through 1964. Over this 10-year period total freight car ownership of Class I railroads dropped 12.4%, and aggregate carrying capacity of those railroads dropped 5%. Over the same period revenue tons orig-

inated dropped 2.9%. The decline in ownership of plain box cars, as opposed to more sophisticated types of cars, was even more dramatic; ownership of cars over the 10-year period in question dropped 22.1%, while aggregate carrying capacity of such cars dropped 18.9%. Testimony of witnesses for the National Industrial Traffic League, the Western Wood Products Association, the American Plywood Association, and the Vulcan Materials Association also supported the finding of a car shortage. These statistics, taken together with the Commission's post-war determination of a car shortage, portray a gradually worsening ratio of carrying capacity to revenue tons originated.

The Commission further found that freight car shortages, in the sense that a particular road was unable to promptly supply freight cars to particular shippers who needed them, have occurred chronically, both during peak loading seasons each year and during times of national emergency. It is quite true, as appellees suggest, that inability of the roads to supply cars to shippers at particular times is not conclusive evidence that there is a national shortage of freight car ownership. Conceivably, freight car ownership could be adequate, yet poor utilization of the supply results in shortages. Nonetheless, the Commission may fairly rely on these chronic shortages in availability of freight cars as one factor upon which to base its conclusion that there was an overall shortage of ownership of freight cars.

The Commission also found that a surprisingly low percentage of freight cars was actually on the tracks of the roads owning the cars at any given time, and that this percentage had been decreasing during the period in question. In March 1966, less than 30% of the railroads' plain box cars were on the line of their owner, and during the preceding year that percentage

remained mostly in the low thirties. The Commission summarized the factual situation it found in these words:

> "From the evidence adduced and the data collected, it is obvious that an adequate freight car supply is as much a problem today as it was during the period considered in our last proceeding in 1947. Car service which involves a shortage of approximately one out of every ten cars ordered or even one out of every fifteen cars ordered demands that every available means be marshalled to eliminate such deficiencies." 335 I. C. C., at 285.

One of the means marshaled by the Commission to eliminate such deficiencies was the promulgation of the two rules under attack here. The thrust of these rules is to require that freight cars after unloading be dispatched in the direction of the lines of the owning road.

Thus, the Commission concluded after investigation that the railroads were frequently unable to supply shippers with freight cars. It reasoned from this fact, and from statistics showing a significantly more rapid decline in aggregate carrying capacity than in revenue tons originated, that an underlying and important cause of the unavailability of box cars to shippers was that the Nation's railroads simply did not jointly own a sufficient number of freight cars to adequately serve shippers of goods over their lines. Because of the existence of the national pool of freight cars, whereby roads may service on-line shippers with foreign cars, it was difficult, if not impossible, to relate inadequate ownership statistically to any particular road or roads. The Commission therefore chose to make mandatory two of the car-service rules that would have the effect of aligning more closely than at present the ownership of freight cars on the part of the road with the availability of those freight cars to the own-

ing road for use of its on-line shippers. The result of these rules, over the long term, the Commission reasoned, would be to bring home to those roads which themselves had an inadequate supply of cars to serve their on-line shippers that fact, and also without doubt to supply incentive to such roads to augment their supply of freight cars in order to adequately serve their on-line shippers. The national supply of freight cars would thereby be augmented, and the railroads as a result would be better able to supply the needs of shippers.

Appellees' fundamental substantive contention is that the short-term consequences of the enforcement of these rules will so seriously disrupt established industry practices as to outweigh any possible long-term benefits in service that might accrue from them, and that therefore the rules are not "reasonable" as that term is used in the Esch Act.[4] While of course conceding that the railroads themselves originally promulgated the rules for voluntary compliance, appellees argue that because the rules have been observed largely in the breach, usages and practices have grown up that permit far more efficient utilization of the existing fleet of freight cars than would be permitted if the two rules in question were enforced by the Commission. Appellees state that in reliance on the existence of a national pool of freight cars, and on the consequent availability to shippers of cars not owned by the line originating the shipment, manufacturing plants have been located and enlarged.

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[4] Three separate briefs have been filed here in support of appellees, each of which understandably presents the case for affirmance in slightly differing form, and no one of which completely adopts the reasoning of the District Court. We have not found it necessary in deciding the case to deal with each separate argument in support of affirmance, since we believe all of them to be generally subsumed under those claims with which we deal.

They claim that enforcement of the rules now would seriously hamper the movement of freight traffic from these and other shipping points.

It may be conceded that the immediate effect of the Commission's order will be to disrupt some established practices with respect to the handling and routing of freight cars, and on occasion to cause serious inconvenience to shippers and railroads alike. If the Commission were thrusting these regulations upon an admittedly smoothly functioning transportation industry, well supplied with necessary rolling stock and adequately serving all shippers, the rationality of its action might well be open to question.

But such is not the case. The Commission's finding that there are recurring periods of significant length when there is not an adequate freight car supply to service shippers is supported by substantial evidence. While the flexible system of routing freight cars presently in existence may well have short-term advantages both for some shippers and some roads, the Commission could quite reasonably conclude that it has long-term drawbacks as well. The otherwise adverse effect on a road's ability to serve shippers that would result from its owning too few cars is cushioned; the beneficial effect on a road's ability to serve shippers that would result from its owning a sufficient supply of cars is dissipated. The Commission undoubtedly felt that rules designed only to most efficiently utilize the existing inadequate fleet of freight cars would have little or no effect on the nationwide shortage of such cars. Indeed, the appellees stress the concession by the Commission that these rules "are not designed to improve the utilization of freight cars, except insofar as return loading is compatible with the primary objective of increasing availability of cars to the owner." 335 I. C. C., at 294. But only if we were to hold that Congress, in enact-

ing the Esch Car Service Act, intended that the only criterion that the Commission might consider in establishing "reasonable rules, regulations, and practices with respect to car service" was the optimum utilization of an existing fleet of freight cars, however numerically inadequate that fleet might be, could this argument be sustained. Neither the language that Congress used nor the legislative history of the Act supports such a narrow reading of its grant of authority to the Commission. On the record before it, the Commission was justified in deciding that the railroads and the shippers were afflicted with an economic illness that might have to get worse before it got better. Existing practices respecting car service tended to destroy any incentive on the part of railroads to acquire new cars, and the resulting failure to acquire new equipment contributed to an overall nationwide shortage of freight cars that prevented the railroad industry from adequately serving shippers. Car-service rules that would tend to restore incentive to the various roads to augment their supply of freight cars, even at the temporary expense of optimum utilization of the existing fleet of freight cars, conform under these circumstances to the statutory requirement of reasonableness.

Appellees support their claim that the Commission's promulgation of these rules is not "reasonable" under the Esch Act on two grounds not directly related to the rules' claimed adverse effect on the ability of the roads to serve shippers. They attack the absence of a Commission finding as to the financial ability of roads inadequately supplied with freight cars to purchase new ones, and they cite the conceded impossibility of obtaining complete compliance with the rules as additional evidence of their unreasonableness.

The Commission's order does not require any road to purchase any freight cars. It abridges to some extent

the existing practice among railroads of treating the freight cars that they own as a pool, and for that reason may ultimately cause roads that do not have an adequate supply of freight cars to serve on-line shippers to be less able to serve such shippers than they are now. If, as a result of this fact, such roads are placed under economic and competitive pressure to acquire additional freight cars, there is certainly no principle of law we know of that would require the Commission to permit them to avoid this economic pressure by continuing to borrow freight cars acquired and owned by other lines.

The Commission, acceding to the arguments of shippers and railroads on rehearing, agreed that mandatory total compliance with the rules promulgated would be impossible in view of the tremendous number of units involved, and, accordingly a procedure by which exceptions might be applied for was established. How the provision for exceptions will be administered in practice is a matter about which we could only speculate at present. It is well established that an agency's authority to proceed in a complex area such as car-service regulation by means of rules of general application entails a concomitant authority to provide exemption procedures in order to allow for special circumstances. *Permian Basin Area Rate Cases*, 390 U. S. 747, 784–786 (1968). What bearing any of these factors might have on an action under the provisions of 49 U. S. C. § 1 (17) for the collection of penalties for a violation of the rules in question is a question best decided in such a proceeding. The fact that violation of a rule promulgated under the Esch Car Service Act may be the basis for a proceeding to collect a penalty does not either expand or contract the statutory definition of "reasonable" found in that Act.

What we have said thus far is enough to indicate our view that there is sufficient relationship between the

Commission's conclusions and the factual bases in the record upon which it relied to substantively support this exercise of its authority under the Esch Act. Appellees press on us an additional claim that the Commission failed to comply with the provisions of the Administrative Procedure Act, 5 U. S. C. § 551 *et seq.*, citing *Burlington Truck Lines* v. *United States*, 371 U. S. 156 (1962), and *Secretary of Agriculture* v. *United States*, 347 U. S. 645 (1954). *Burlington Truck Lines* is clearly inapposite, however, since in that case the Court was dealing with adjudication, not rulemaking. In criticizing the Commission's action there, the Court said that "the Administrative Procedure Act will not permit us to accept such adjudicatory practice," 371 U. S., at 167. In *Secretary of Agriculture* v. *United States, supra*, the Court reviewed the Commission's action, not under the Administrative Procedure Act, but on the basis of its prior cases establishing the standard for judicial review of agency action. Commenting that "[i]n dealing with technical and complex matters like these, the Commission must necessarily have wide discretion in formulating appropriate solutions," the Court went on to conclude that the Commission "has not adequately explained its departure from prior norms and has not sufficiently spelled out the legal basis of its decision." 347 U. S., at 652–653. For the reasons previously stated, we find no such infirmities here.

This Court has held that the Administrative Procedure Act applies to proceedings before the Interstate Commerce Commission. *Minneapolis & St. Louis R. Co.* v. *United States*, 361 U. S. 173, 192 (1959). Appellees claim that the Commission's procedure here departed from the provisions of 5 U. S. C. §§ 556 and 557 of the Act. Those sections, however, govern a rulemaking proceeding only when 5 U. S. C. § 553 so requires. The latter section, dealing generally with rulemaking,

makes applicable the provisions of §§ 556 and 557 only "[w]hen rules are required by statute to be made on the record after opportunity for an agency hearing . . . ." The Esch Act, authorizing the Commission "after hearing, on a complaint or upon its own initiative without complaint, [to] establish reasonable rules, regulations, and practices with respect to car service . . . ," 49 U. S. C. § 1 (14)(a), does not require that such rules "be made on the record." 5 U. S. C. § 553. That distinction is determinative for this case. "A good deal of significance lies in the fact that some statutes do expressly require determinations on the record." 2 K. Davis, Administrative Law Treatise § 13.08, p. 225 (1958). Sections 556 and 557 need be applied "only where the agency statute, in addition to providing a hearing, prescribes explicity that it be 'on the record.'" *Siegel* v. *Atomic Energy Comm'n*, 130 U. S. App. D. C. 307, 400 F. 2d 778, 785 (1968); *Joseph E. Seagram & Sons Inc.* v. *Dillon*, 120 U. S. App. D. C. 112, 344 F. 2d 497, 500 n. 9 (1965). Cf. *First National Bank* v. *First Federal Savings & Loan Assn.*, 96 U. S. App. D. C. 194, 225 F. 2d 33 (1955). We do not suggest that only the precise words "on the record" in the applicable statute will suffice to make §§ 556 and 557 applicable to rulemaking proceedings, but we do hold that the language of the Esch Car Service Act is insufficient to invoke these sections.

Because the proceedings under review were an exercise of legislative rulemaking power rather than adjudicatory hearings as in *Wong Yang Sung* v. *McGrath*, 339 U. S. 33 (1950), and *Ohio Bell Telephone Co.* v. *Public Utilities Comm'n*, 301 U. S. 292 (1937), and because 49 U. S. C. § 1(14)(a) does not require a determination "on the record," the provisions of 5 U. S. C. §§ 556 and 557 were inapplicable.

This proceeding, therefore, was governed by the provisions of 5 U. S. C. § 553 of the Administrative Procedure Act, requiring basically that notice of proposed rulemaking shall be published in the Federal Register, that after notice the agency give interested persons an opportunity to participate in the rulemaking through appropriate submissions, and that after consideration of the record so made the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.[5] The "Findings" and "Conclusions" embodied in the Commission's report fully comply with these requirements, and nothing more was required by the Administrative Procedure Act.

We conclude that the Commission's action in promulgating these rules was substantively authorized by the Esch Act and procedurally acceptable under the Administrative Procedure Act. The judgment of the District Court must therefore be

Reversed.

[5] 49 U. S. C. § 1 (14) (a) likewise requires the Commission to conduct a hearing before promulgating rules.